(23)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 864

F. F. DOLLERT, ET AL
Petitioners

v.

PRATT-HEWIT OIL CORPORATION, ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS, IN AND FOR THE FOURTH JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO, AND BRIEF IN SUPPORT THEREOF

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INDEX TO PETITION AND BRIEF

INDEX OF AUTHORITIES

Cases Cited — Page

Cases Cited — Page

Cases Cited — Page

Cases Cited — Page

Constitution of the United States Cited:

INDEX OF AUTHORITIES—(Cont'd.)

INDEX OF AUTHORITIES—(Cont'd.)

INDEX OF AUTHORITIES—(Cont'd.)

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, F. F. Dollert, respectfully shows:

I.

Summary Statement of the Matter Involved

This petition presents one main jurisdictional is-

sue, namely, that the *refusal* of the Court of Civil Appeals to judicially determine the several motions of petitioner, (Tr. R. 1 to 3) which are all to the one effect, that the September 28, 1925 contract is void ab initio and the judgment entered thereon by the District Court on January 26, 1937, is void on its face, *necessarily constituted a taking and depriving* petitioner and the stockholders of the Pratt-Hewit Oil Corporation hereinafter at times referred to as Pratt-Hewit Corp., and the corporation itself of their valuable oil properties situated in Texas and giving them to the Houston Oil Company without any judicial determination of this issue, upon which determination alone such deprivation could be justified. Such procedure denied them

(a) the due process of law guaranteed to them by the 14th Amendment of the Constitution of the United States and

(b) also denied to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the Constitution of the United States. *Fayerweather* v. *Ritch*, 195 U. S. 276, 25 S. Ct. 58, 49 L. Ed. 193. *Chicago, Burlington etc. R. R.* v. *Chicago*, 166 U. S. 226.

The foregoing issue and its sustaining sub issues, although determinative of the entire subject matter of the litigation and presenting purely jurisdictional questions which every court was in duty bound to pass upon before proceeding further, nev-

ertheless, have gone through the Federal and the State courts of Texas and have never been passed upon or even mentioned by a single court.

Furthermore, in all the briefs filed by the attorneys for the defendants, not one sentence has been written or one single case cited taking issue with petitioner's legal contention that the September 28, 1925 contract was void and never came into existence, that it could not be the basis of a legal proceeding or a judgment and that, therefore, the parties today stand in relation to each other as they stood before the contract was made. Still more astounding is it when the facts which petitioner has martialed to sustain his contentions are all to be found in the written instruments, contracts, and oil and gas lease assignments *entered into by the defendants*, the Houston Oil Company and Pratt, and the intermediary, A. D. Rooke, and sedulously secreted in the files in their offices until they were compelled to produce them by court order issued in the Federal District Court.

To a void contract and a judgment void on its face, neither lapse of time, laches, stale demand, estoppel, res adjudicata, limitations, ratification, confirmation, waiver, nor want of due diligence may be pleaded as a defense. 25 Tex. Jur. p. 693.

"In conclusion it should be noted that the principle of estoppel does not apply to an agreement which the law holds void as against public policy. The ratification of such a contract by acquiescence

or laches as nugatory as the contract itself." 9 Amer. Jur. 391.

"A void judgment 'is good nowhere and bad everywhere' and neither lapse of time *nor judicial action* can impart validity. It is not susceptible of ratification or confirmation, and its invalidity may not be waived." 25 Tex. Jur. Sec. 254, p. 693.

Vol. 1, Freeman on Judgments, 5th Ed., pages 643, 644, reads as follows:

"The fact that the void judgment has been *affirmed on review in an appellate court* or an order or judgment renewing or reviving it entered adds nothing to its validity."

"Nor will a void judgment be given effect of *res judicata* in a subsequent suit *involving the same subject matter*, *Ruby* v. *Dans*, Texas Civ. App. 277 S. W. 430;" 2 Black on Judgments, Sec. 513, 611.

"(Pa. Super. Ct.) It is never too late to attack a judgment for want of jurisdiction which appears on the face of the record. *Mintz* v. *Mintz*, 83 Pa. Super. Ct. 85"—17-3rd. Dec. Dig., p. 406.

"The invalidity of the judgment, however, does not affect the pendency of the suit in the District Court of Jones County. Its status is the same as though it had never been tried." *Ibill* v. *Stovall*, 92 S. W. 1067 2d (Tex. Civ. App.)

Affirmative defense, like the foregoing, cannot make legal a contract which is forbidden by statute or public policy or a judgment void on its face. Therefore, the foregoing affirmative defenses may not be pleaded in opposition to this petition for certiorari.

Petitioner F. F. Dollert is and ever since the Pratt-Hewit Oil Corporation was incorporated in April, 1923, has been a stockholder of that corporation. In July, 1943, petitioner filed a motion in the District Court of Refugio County, Texas in the case of W. E. Hewit et al versus Pratt-Hewit Oil Corporation, et al, No. 795, to vacate and set aside a pretended judgment entered in this action on January 26, 1937, during vacation time, for the reason that it is void on its face. The following are most, but not all, of the grounds urged to support petitioner's contention in his motion that the judgment was void ab initio, thus being incapable of creating, bestowing, or extinguishing any rights and whose nullity cannot be waived. Tr. R. p. 1 to 3.

(Tr. R. p. ____ means State Transcript of Record and Fed. Tr. R. ____ means Federal Transcript of Record. The state District Court, by order, sent up to the Court of Civil Apppeals as an original exhibit the printed record consisting of two volumes and the various briefs filed by attorneys in the U. S. Circuit Court of Appeals)

(The order in which the reasons are given in the motion is not followed here.)

1. It is void because the September 28, 1925 contract, which was sought to be cancelled by the plaintiff in that suit, was void ab initio, since the contract is prohibited by Texas statutes, which fact also necessarily renders the said judgment void:

(a) the contract unlawfully attempts to delegate the managerial powers of the Pratt-Hewit Corporation vested by its charter and the laws of Texas and of Delaware with the directors of the corporation, to the directors of the corporation's competitor, the Houston Oil Company, said contract being also against public policy: (Tr. R. 4 to 5)

(b) the contract is prohibited by the Usury Statutes of Texas:

(c) the contract violates the Texas Anti-Monopoly and Anti-Trust laws and the Constitution of Texas, Art. I, Sec. 26. (Tr. R. 5)

2. While not contained in petitioner's motion, nevertheless, petitioner's proposed amended petition sets forth still another reason why the September 28, 1925 contract and the judgment of January 26, 1937 are void. Thomas H. Pratt, the dominant stockholder, secretary, and treasurer, director, and resident manager in Texas, who negotiated the alleged September 28, 1925 contract in behalf of his corporation, had disqualified himself and forfeited his right to represent his corporation in making that

instrument with the Houston Oil Company. For several months before the contract was made, at the time and also continuously thereafter until his death on September 3, 1938, he had daily secret private business dealings with the Houston Oil Company, unbeknown to the stockholders, which conflicted with the duty he owed his corporation and its stockholders. Briefly stated, these transactions consisted of the Houston Oil Company and its president paying to Thomas H. Pratt approximately $51,000. in cash and also securing for him a producing 3/32 interest in a 200 acre lease from which he realized, up to the time of his death in 1938, $125,000 or more. These allegations were pleaded in detail as set out in petitioner's proposed amended original petition (Tr. R. 10 to 17) and have not been denied or disputed at any time by the defendants. These facts were taken from the contracts and oil and gas lease assignments entered into between defendants and kept hid until produced by order of court, therefore they cannot be disputed. Furthermore, under a second court order, the Houston Oil Company permitted the examination of its book accounts which showed that the Houston Oil Company had accommodated Pratt wth four secret loans totaling $14.500. Those orders were made by U. S. district Court.

3. The judgment of January 26, 1937, even if it were otherwise legal, which is denied, is void also because of the manner in which it was attempted to be entered:

(a) This being a stockholders' action, it could not be dismissed "with prejudice" in vacation time without denying intervenor F. F. Dollert and the other stockholders and the Pratt-Hewit Corporation itself the right to carry on the litigation, if they so desired, without notice being first sent out to them under the direction of the Court and without giving them an opportunity to be heard before the case should be dismissed on the merits. There is nothing in the record to show that such notice was given that the case would be taken up in vacation time and dismissed with prejudice. (Tr. R. 32 to 37) In fact, no such notice was given or sent out (Fed. Tr. R. 804) and therefore, Dollert and the other stockholders who, with a few exceptions, live in Wisconsin, and the Pratt-Hewit Corporation, knew nothing about the entering of said judgment. The failure to give such notice denied petitioner, the stockholders, and the Pratt-Hewit Corporation the due process of law as guaranteed to them by the 14th Amendment of the United States Constitution.

(b) The petition of the plaintiff, among other things, charged Pratt with a violation of his trust. It is clear that the interests of Thomas H. Pratt as a defendant in this case were directly in conflict with the interests of his corporation which was the true plaintiff. Yet Pratt, through his private attorney, J. V. Vandenberge Jr., took it upon himself to file an answer for the Pratt-Hewit Corporation, which was signed by J. V. Vandenberge Jr. as its attorney and sworn to by Thomas H. Pratt. The latter individually filed his own private answer

which was sworn to by him and signed by his private attorney, J. V. Vandenberge, Jr. The Corporation being the true plaintiff, the latter attempted to appear for the plaintiff and also for the defendant. Pratt and his private attorney, J. V. Vandenberge Jr., as the record shows (Tr. R. 32 to 37), unlawfully and to the prejudice of the corporation, attempted to consent for the Pratt-Hewit Corporation in writing to the taking up of the case in vacation time and to the dismissal of the case with prejudice.

According to Texas statutes, until changed by the legislature about two years ago, no judge could take up and dispose of a civil action without the consent of all parties to the action. Art. 1915, Vernon Texas Statutes, 1928.

It was well settled in Texas before the law was passed that a judge could not, without the consent of all parties, dismiss a civil action in vacation time. 11 Tex. Jur. 816, 817 and 819.

The September 28, 1925 contract being void, inescapably the judgment is void. The contract being void in its inception, it and the judgments attempted to be issued thereon in both state and federal court are a complete nullity for they are incapable of being the subject of litigation. They confer no right to anyone. They bind nobody and are subject to *attack by a motion to dismiss* or *by attack in the case where the contract is the subject of litigation and where an alleged judgment has*

been obtained, or in any other court wherein any rights are claimed under the void contract and judgment. 25 Tex. Jur. p. 693, Freeman on Judgments, 5th Ed., Vol. 1, p. 643.

The September 28, 1925 contract and the alleged judgment of January 26, 1937 in the District Court of Refugio County left the two parties litigant, the Houston Oil Company and the Pratt-Hewit Corporation, in the same position that they were prior to September 28, 1925, the date when said contract was made, except as to the ½ interest in the 23,000 acres of oil and gas lease, in the two producing oil and gas wells, and the half of the oil and gas taken by the Houston Oil Company from underneath said leases in which it claimed and claims ownership, the Houston Oil Company on September 28, 1925 became and still is a *mere constructive trustee* with the Pratt-Hewit Corporation *its cestui que trust.*

The purpose of reciting the foregoing issues and giving a few of the uncontroverted and admitted facts in this application for certiorari is not primarily to show an insupportable decision on the face of the record on the merits of the issues but to prove to this Court that the *necessary result* of the course of procedure in the Court of Civil Appeals and also the Supreme Court of Texas in their silence as to these issues presented to them, involves a Federal question of substance, namely, a taking away and depriving petitioner, the stockholders, and the Pratt-Hewit Corporation of their valuable oil rights

in Texas without any judicial determination of the fact upon which alone such a deprivation could be justified and that said course of procedure also denies to the petitioner and the stockholders "the privileges and immunities" they possess as citizens of the United States, all contrary o the 14th Amendment of the United States Constitution, which gives this Court jurisdiction.

Attached to and made a part of petitioner's motion is his proposed amended petition whose main objectives are (Tr. R. 3 to 22)

1. to have the September 28, 1925 contract, the subject of this litigation, declared to be void because

(a) its provisions violated Texas Usury, Anti-Trust, and Anti-Monopoly statutes:

(b) it attempted to vest the managerial powers of the corporation, contrary to Texas statutes and the corporation's charter, with the directors of its competitor, the Houston Oil Company, one of the defendants in the case:

2. The Contract being void ab initio, it follows that the judgment is void and never has had any existence and could not bestow rights upon the defendants, nor could it be the basis of any litigation, except of a motion to have the same set aside and dismissed.

3. The contract is void because Thomas H. Pratt,

the dominant stockholder and resident manager who negotiated the contract with the Houston Oil Company in behalf of the Pratt-Hewit Corporation, had disqualified himself from making the contract for his corporation, because of his secret financial dealings with the Houston Oil Company, which constituted a flagrant violation of trust and duty. Tr. R. 10 to 17.

To impress with a constructive trust all of the property of the Pratt-Hewit Corporation, real and personal, which the Houston Oil Company took possession of allegedly by virtue of the September 28, 1925 pretended contract, from said date until this date, with the Houston Oil Company as constructive trustee and the Pratt-Hewit Corporation as cestui que trust.

5. For a reconveyance of all the real and personal property conveyed by the Pratt-Hewit Corp. to the Houston Oil Company from September 28, 1925 to date and for an accounting of all the oil and gas taken from underneath the 23,000 acres of oil and gas leases which the Pratt-Hewit Corporation had on September 28, 1925 from that date until this day.

6. For the cancellation of the stock of the Pratt-Hewit Corporation fraudulently transferred to Pratt by himself as secretary of that corporation as his alleged share of the oil venture, and now in the hands of parties other than purchasers in good faith.

Although all the defendants who originally were served or made their appearance in the case when it was brought, were served with the notice of the petitioner's motion, none of them appeared.

William H. Blades, the general attorney for the Houston Oil Company who represented the Houston Oil Company in the Federal case of Wert T. Reed et al vs. Houston Oil Company et al, and Ben F. Vaughan Jr., who is the general attorney for the Pratt-Hewit Corporation and likewise defended his corporation in the same case in the Federal Court, each made application to be permitted to appear as amicus curiae in the District Court of Refugio County and also in the Court of Civil Appeals as amicus curiae. Petitioner objected to their appearance in that capacity for the reason that they were the paid attorneys of their respective clients as just stated and therefore it was humanly impossible for them to appear in the capacity of disinterested parties. Both courts overruled petitioner's objection. (Tr. R. 27, 28) W. H. Blades made application to file his brief as amicus curiae in the Supreme Court of Texas in opposition to the application for writ of error. That court permitted him to leave his answer and suggestions as amicus curiae with the clerk but denied him the right to make the same a part of the record.

The defendants, therefore, are in default. This carries with it the presumption that all the allegations well pleaded by petitioner are true. However,

petitioner does not need such a presumption, for the records by which petitioner is proving his case are those written, executed, and kept secret from the stockholders until dug up and produced by the Houston Oil Company through court order issued by the Federal District Judge in the case of Wert T. Reed, et al vs. Houston Oil Company, et al in the year 1940.

II.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C., Section 344 (Section 237 Jud. Code Amended) Subdivision (b) and the 14th Amendment of the Constitution of the United States.

This Court has jurisdiction because the Court of Civil Appeals in and for the Fourth Supreme Judicial District of Texas, San Antonio, erred in its refusal to make a determination of the various issues presented by petitioner's motion to the District Court, the necessary result of the course of procedure thus followed in that court being a denial of the rights of petitioner and the other stockholders, a taking away from and depriving them of their valuable oil properties without judicial determination of the facts and the law upon which alone such deprivation could be justified, and also denying to petitioner and the stockholders the privileges and immunities they possess as citizens of the Unit-

ed States, all contrary to the 14th Amendment of the Constitution of the United States. This case therefore presents an important and substantial question of Federal law.

The judgment of the Civil Court of Appeals appealed from is a judgment by the highest court of the state of Texas in which a decision could be had on the issues presented in petitioner's motion. (Articles 1819, 1820, 1821 Vernon's Statutes of Texas) Petitioner made a motion for a rehearing in the Court of Civil Appeals which was denied without an opinion. Application for a writ of error to the Supreme Court of Texas was filed with that court. This was denied by the Supreme Court of Texas without opinion. Petitioner then made a motion for a rehearing. This, too, was denied without an opinion. Thus all remedies in the state courts of Texas have been exhausted.

III.

Question Presented

The question presented is this, whether the Court of Civil Appeals in its *failure* to determine and decide the jurisdictional issues presented to it, namely, that the alleged September 28, 1925 contract and the judgment entered thereon in the District Court of Refugio County on January 26, 1937 are void because

(a) the contract unlawfully attempts to dele-

gate the managerial powers of the Pratt-Hewit Corporation vested by its charter in the laws of Texas and Delaware to the corporation's competitor, the defendant Houston Oil Company, said contract being also violative of public policy:

(b) the contract is prohibited by the Usury Statutes of Texas:

(c) the contract violates the Texas Anti-Monopoly and Anti-Trust laws and the Constitution of Texas, Art. I, Sect. 26:

(d) Thomas H. Pratt, the dominant stockholder, secretary and treasurer and resident manager in Texas, who negotiated the alleged September 28, 1925 contract, had disqualified himself from representing his corporation in the making of that instrument because he, at the time, was having secret continuous financial dealings with the Houston Oil Company, thereby placing private interest in conflict with the duty he owed his corporation:

(e) the judgment of January 26, 1937, dismissing the complaint with prejudice, is void, this being a stockholders' action and being taken up in vacation time, petitioner and the stockholders and the Pratt-Hewit Corporation not having been given the notice to which they were entitled that the case was being taken up in vacation time and was to be dismissed with prejudice; and further that the Pratt-Hewit Corporation was entitled to be represented in this matter, not by Thomas H. Pratt, who

was also a defendant in the case, and not by his private attorney, but by some stockholder who was not a defendant; does (Court of Civil Appeals) not thereby absolutely deprive petitioner and the stockholders of the Pratt-Hewit Corporation and the corporation itself of their valuable oil properties situated in Texas without any judicial determination of those jurisdictional issues, contrary to the Due Process Clause of the 14th Amendment of the Constitution of the United States, and thereby also absolutely deny to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the United States Constitution. *Fayerweather* v. *Ritch*, 195 U. S. 276, 25 S. Ct. 58, 49 L. Ed. 193. *Chicago, Burlington etc. R. R.* v. *Chicago*, 166 U. S. 226.

IV.

Reasons Relied on for the Allowance of the Writ

The question whether the September 28, 1925 contract and the judgment entered thereon on January 26, 1937 by the District Court are void is a jurisdictional issue, one which, whenever presented, it becomes the duty of the Court to determine, whether in trial or appellate court or in the Supreme Court of the state or this Court. This is particularly so when the failure of the Court to do its duty necessarily deprives the litigant of his property or denies him the privileges and immunities to which all citizens of the United States are entitled. The issues presented to the Court of Civil Appeals involve prop-

erty and civil rights of substance which do not lie within the judicial discretion of a court to ignore. Furthermore, the action of the Court of Civil Appeals constitutes a violation of Rule 451 of the Rules of Practice and Procedure in Civil Action promulgated by the Supreme Court of Texas and which were in effect at the time that the Court of Civil Appeals rendered its decision. This rule, which is the same as Art. 1876 of the Revised Statutes of Texas, except for minor textual changes, reads as follows:

> "The Courts of Civil Appeals shall decide all issues presented to them by proper assignments of error by either party, whether such issues be of fact or of law, and announce in writing their conclusions."

The question of jurisdiction is always open in either the trial or the appellate court and it is the duty of the court to make its determination of the question whenever raised.

> "Want of jurisdiction of the subject matter of the suit will arrest a cause at any stage of the proceeding." Ableman et al v. Bloomfield, 6 Tex. 263. Evans v. Pigg, 28 Tex. 587, 591, Chicago B. & Q. Ry. Co. v. Willard, 220 U. S. 413, 55 L. Ed. , 31 Sup. Ct. 460.

When the Court of Civil Appeals completely ignores the jurisdictional issues presented to it and then finds that the petitioner's motion was a motion for a new trial, which had come too late, it begs the question because it assumes that the September 28, 1925 contract and the judgment decreed thereupon and all the proceedings in the court are valid when the petitioner's motion charges that they are all void and cannot create any rights. A motion for a new trial assumes that the Court had jurisdiction of the subject matter which in this instance is strenuously disputed. Before the Court of Civil Appeals could make the decision which it did, it was in duty bound to decide the issues submitted to it. Petitioner, in both Federal and Texas courts, has repeatedly raised these issues, yet every court has treated them with silence. Likewise, defendants' attorneys have never attempted to answer petitioner's contentions in support of the main issue and its subordinate ones. Also the attorneys for the defendants at no time disputed the facts in the case as presented by petitioner. Of course that was impossible as they could not very well dispute the contracts and oil and gas lease assignments executed and secreted by their clients.

The vice resulting from the failure of the various courts to make a judicial determination as to the main jurisdictional issue and its sustaining sub is-

sues is not that their decisions may be incorrect but that NO judicial determination of the questions was made. That failure resulted in bringing into this litigation a federal question of real substance, namely, the taking of the property of the petitioner and the stockholders and the Pratt-Hewit Corporation and giving it to the Houston Oil Company which, without a judicial determination, could not be justified and could not meet the requirements of the "due process of law" and the "privileges and immunities" clause of the 14th Amendment of the Constitution of the United States.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Court of Civil Appeals in and for the 4th Judicial District of Texas, at San Antonio, commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Civil Appeals had in the case, numbered and entitled on its docket, No. 11,394, styled *F. F. Dollert, et al, appellant* v. *Pratt-Hewit Oil Corporation et al*, appellees, to the end that this cause may be reviewed and determined by this Court, as provided for by the statutes of the United States; and that the judgment herein of said Court of Civil Appeals in and for the 4th District of Texas at San Antonio, be reversed by this Court

and for such further relief as to this Court and for such further relief as to this Court may seem proper.

Dated this day of January, 1945.

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BRIEF OF PETITIONER

I.

History of the Litigation

The original petition Fed. Tr. R. 186-222) in this case of *W. E. Hewit* v. *Pratt-Hewit Oil Corporation et al* was filed in the District Court of Refugio County, Texas, in September, 1927, Case No. 795. This originally was a class action brought by

W. E. Hewit and all the stockholders similarly situated of the Pratt-Hewit Oil Corporation, hereinafter referred to as the Pratt-Hewit Corp, to cancel the September 28, 1925 contract. The stockholders, who numbered more than 400, with but a few exceptions, lived in Wisconsin. The other defendants in the case were the Houston Oil Company of Texas and all the directors and officials of the Pratt-Hewit Corp. The original petition of W. E. Hewit is to be found in full on pages 186 to 222 of the Fed. T. of R.

F. F. Dollert, of Wisconsin, petitioner herein, intervened with his attorney, a Mr. Boothe of San Antonio, Texas, and adopted as his petition the petition of W. E. Hewit. Likewise, five other Wisconsin stockholders intervened and adopted Hewit's petition as theirs.

Defendants filed a plea in abatement praying for dismissal of the case. The Pratt-Hewit Corp was organized under the laws of Delaware and was doing business in Texas without having secured a permit from the Secretary of State of Texas and therefore was barred by statute from bringing and prosecuting any suit in Texas courts. It was contended by the defendants that as the corporation could not maintain the suit, its stockholders could not maintain the suit in its behalf. The District Court sustained the motion to dismiss. The Court of Civil Appeals reversed the decision of the District Court. 35 S. W. 2d, p. 787. The Supreme Court of Texas

affirmed the latter's decision by an opinion. 52 S. W. 2d 64.

On January 26, 1937, in vacation time, the stockholders' action was taken up and dismissed with prejudice (Tr. R. p. 32 to 37) upon stipulation between plaintiff Hewit, the five intervening stockholders as plaintiffs, and the Houston Oil Company, Thomas H. Pratt, and the other officials and directors who had made their appearance as defendants. No notice was given to intervenor F. F. Dollert and his attorney and also none was given to any of the other 400 stockholders. An answer was filed, purporting to be that of the Pratt-Hewit Corp., sworn to by Pratt, a defendant, and signed by Pratt's personal attorney who also filed an answer for Pratt individually which was sworn to by Pratt, (Tr. of R. 36) although the Pratt-Hewit Corp. was the true plaintiff and Pratt a defendant.

In September, 1939 or thereabouts, through E. H. Buckner, the former president of the Houston Oil Company, the official who represented that defendant in making the September 28, 1925 contract, made a statement that the Houston Oil Company, at the time said contract was made, had paid to Thomas H. Pratt $50,000. in cash for a 7/32 interest in the A. D. Rooke lease, which interest cost Pratt nothing, as A. D. Rooke, from whom Pratt received his interest, later testified in the Federal Court, Fed. Tr. R. p. 836) and that Buckner himself had paid Pratt approximately $18,000. for a 4/32 interest in the same lease. Upon this informa-

tion, suit was filed by stockholder Wert T. Reed in the United States District Court, Southern District, at Victoria, Texas, and was transferred to Houston. Upon order of the Court, the Houston Oil Company produced Exhibits 3 to 8, inclusive, described in petitioner's proposed amended petition. (Tr. R. 10 to 17) secret contracts and secret oil and gas lease assignments entered into between the Houston Oil Company, Pratt, and A. D. Rooke, the party used to smoke-screen the deal. These instruments, although they are such as oil men and oil companies never fail to put of record, have never been recorded by the Houston Oil Company and Pratt.

Upon order of Court, plaintiff in the Federal Court case examined the book of the Houston Oil Company and found that it had accommodated Pratt with four loans, totaling $14,500., two given before and two after the September 28, 1925 contract was made. (Fed. Tr. R. 768-774)

The case was tried before the court, the Hon. James V. Allred presiding. A number of technical findings were made by the Court, such as that no demand was first made upon the directors before suit was commenced, that Wert T. Reed was not a stockholder at the time when the alleged fraudulent acts were committed, that plaintiffs could easily have discovered the fraud, that the judgment entered by the District Court of Refugio County on January 26, 1937, Case No. 795, was res judicata. But no finding was made whatsoever of the issues

presented by the petitioner to dismiss the judgment entered January 26, 1937, except that there was no fraud. The case was therefore dismissed.

None of the issues on which petitioner rests this application for certiorari were in fact decided at all and they remain until this day undecided.

An appeal was taken to the Circuit Court of Appeals of the Fifth Circuit. It affirmed the judgment of the District Court. The following is the opinion:

> "It is claimed by appellants that the contract and leases were secured by fraud, part of which consisted in bribing a corporate officer. Many issues were presented and many defenses raised in the court below, but appellees' real defense was that there was no fraud. No good could result either from re-stating the pleadings or reviewing the evidence in this case. The findings and conclusions of the district court are free from error, and the judgment appealed from is affirmed." 132 Fed. 2d 748.

Application for writ of certiorari was made to this Court and was denied. In July, 1943, F. F. Dollert, petitioner, filed his motions which were all to the effect that the September 28, 1925 contract was void, being prohibited by Texas Statutes and public policy, and that the alleged judgment entered in this original case of *Hewit et al* v. *Pratt-Hewitt Corp et al* filed in September, 1927 and dismissed in vacation time on January 26, 1937, are both void. The District Court, upon a very brief and perfunc-

tory hearing of the motion, rendered judgment as follows:

> "It is, therefore, ORDERED, ADJUDGED and DECREED by the Court this 18th day of October, A.D. 1943, that said motions be, and they are hereby, dismissed for lack of jurisdiction; and, further, that if the Court have jurisdiction over said motions, they are hereby denied and overruled for lack of merit." (Tr. R. 28 to 29)

II.

Opinion of the Court of Appeals

The opinion of the Court of Civil Appeals in the above entitled matter in the said Court of Civil Appeals is contained on pages 39 to 42 of the Transcript of Record.

III.

Jurisdiction

The Court of Civil Appeals affirmed the judgment of the District Court on March 8, 1944. The motion for a rehearing was overruled April 5, 1944. Application for Writ of Error was denied for want of merit, May 31, 1944. Motion for Rehearing was refused on September 27, 1944.

This Court has jurisdiction by virtue of 28 U. S. C., Sect. 344 (Sec. 237 Jud. Code Amended) Subdi-

vision (b) and the 14th Amendment of the Constitution of the United States. For further statement as to jurisdiction see what is said under heading II in the petition. In interest of brevity the statement is not repeated at this point.

IV.

Statement of the Case

The statement of the case is given under heading No. I in the petition. In the interest of brevity the statement is not repeated at this point.

V.

Specification of Errors

1. The Court of Civil Appeals erred because it refused to judicially determine the jurisdictional question presented to it, namely, that the September 28, 1925 contract unlawfully attempts to delegate the managerial powers of the Pratt-Hewit Corp, vested by its charter and the laws of Texas and Delaware (latter being the state of its incorporation) with the directors of the corporation, to the directors of the corporation's competitor, the defendant Houston Oil Company, said contract being also violative of public policy and therefore void, which refusal of the Court *necessarily resulted in*

(a) depriving petitioner and the stockholders and the Pratt-Hewit Corp of their valuable oil prop-

erties without a judicial determination, upon which alone such deprivation could be justified, all in violation of the "due process clause" of the 14th Amendment.

(b) denying to petitioner and stockholders "the privileges and immunities" to which they were entitled as citizens of the United States under the 14th Amendment, namely, to have been accorded a judicial determination of that question, the denial of which resulted in the loss of their property.

The refusal of the Court of Civil Appeals to determine each of the other five jurisdictional questions presented by petitioner's motions resulted in the same unconstitutional invasion of the rights and taking away of the property of petitioner, the stockholders, and the corporation without a judicial determination of each issue upon which alone such deprivation could be justified. For brevity's sake a mere short statement of each issue will be given here.

Question 2. The September 28, 1925 contract violates the Texas Usury Statute.

Question 3. The Contract violates Texas Anti-Trust and Anti-Monopoly Statutes.

Question 4. The Contract is void because Thomas H. Pratt, by having secret financial personal dealings which were of great profit to him financially, before and after the contract was made, had disqualified himself from making the contract.

Whatever makes the Contract void necessarily makes the judgment of January 26, 1937 void.

Question 5. The judgment of dismissal of the case with prejudice attempted to be entered January 26, 1937, in vacation time, without giving petitioner or his attorney notice and without giving notice to the 400 stockholders, was void as to petitioner and the 400 stockholders, except as to the four or five who intervened, if such judgment were otherwise valid, which petitioner specifically dénies.

Question 6. The judgment of dismissal with prejudice attempted to be entered on January 26, 1937 is void as to the Pratt-Hewit Corp, the true plaintiff, because it did not give its consent to take up the same in vacation and did not give its consent to enter a judgment of dismissal with prejudice by some agent or officer not disqualified from representing the Pratt-Hewit Corp, because Thomas H. Pratt and his private attorney, the former being a defendant who did attempt to represent the Pratt-Hewit Corp, were disqualified from representing the Pratt-Hewit Corp in consenting to take up the case in vacation time and consenting to a judgment of dismissal with prejudice.

VI.

ARGUMENT

Summary of Argument

Four of petitioner's motions are each to the one

effect, namely: that the alleged September 28, 1925 contract, the cancellation of which is the subject of this litigation, is void.

It requires only a reading of the instrument to demonstrate its invalidity and, therefore, is a mere nullity, in legal effect no contract at all, conferring no rights on the defendant, Houston Oil Company, and taking none away from the Pratt-Hewit Corp.

The Contract being void, it follows that the alleged judgment attempted to be entered upon it by the State district court at Refugio County, Texas "dismissing the case with prejudice" on January 26, 1937, is equally void.

The other two motions of petitioner are each to the effect that the said judgment attempted to be entered upon the void Contract is additionally void of itself on its face, as an inspection of the judgment itself will readily disclose.

The Contract being void

> (a) ". . . . nothing can be acquired or lost by it; it neither bestows nor extinguishes any rights, *and may be successfully assailed whenever it is offered as the foundation for the assertion of any claim or title.* It neither binds nor bars anyone. All acts performed under it and all claims flowing out of it are void. The parties attempting to enforce it may be responsible as trespassers. The purchase at sale by virtue of its authority finds himself without ti-

tle and without redress. (citing Hollingsworth v. Bagley, 35 Tex. 345). No action on the part of the plaintiff, no inaction upon the part of the defendant, no resulting equity in the hands of third persons, no power residing in any legislative or other department of the government, can invest it with any elements of power or of vitality. *It does no terminate or discontinue the action in which it* was entered, nor merge the cause of action; and it cannot prevent the plaintiff from proceeding to obtain a valid judgment upon the cause, *either in the action in which the void judgment was entered or in some other action.* The fact that the void judgment has been affirmed on review in an appellate court (citing Chambers v. Hodges, 23 Tex. 104) or an order or judgment renewing or reviving it entered adds nothing to its validity. Such a judgment has been characterized as a dead limb upon the judicial tree, which may be chopped off at any time, capable of bearing no fruit to the plaintiff but constituting a constant menace to the defendant." Freeman on Judgments, 5th Ed. Vol. I, Sec. 322, p. 643; 25 Tex. Jur. 693. See many cases cited in footnote.

Syllabus: "The *affirmance* by this court *of a void judgment imparts to it no validity;* and *it be may be vacated*, and *its execution enjoined*, at any time." Chambers v. Hodges, (Sup. Ct. Texas) 23 Tex. 104.

From the foregoing it necessarily follows that

(a) affirmative defenses, such as lapse of time, laches, limitation, stale demand, estoppel, ratification, confirmation, waiver, want of due diligence,

and res judicata may not be pleaded as a defense to the setting aside of a void contract and judgment. Where no right has ever existed of any kind or nature there is nothing upon which such defenses can attach or act. The mere pleading of those defenses possesses no creative power supplying the necessary inchoate right on which alone those defenses depend for their potency. 25 Tex. Jur. 643; *Paul* v. *Willis, et al*, 69 Tex. 261, 7 S. W. 357.

> "Though a proceeding to vacate a judgment and set aside a sale made thereunder must be instituted in the court by which the judgment was rendered, *yet it is otherwise if the pretended judgment was an absolute nullity by reason of the fact that jurisdiction has never attached.* Bender v. Damon, 72 Tex. 92; 29 S. W. 747." 11 Cyc. Tex. Rep. 127.

(b) In as much as the September 28, 1925 contract and the judgment entered thereon are both void "jurisdiction has never attached," it follows that *petitioner's motions present jurisdictional questions.* By reason thereof it *became the duty of each court* to which those questions were presented to pass upon those issues before proceeding any further. In this the Court of Civil Appeals completely failed.

The question presented by the petition for certiorari is, whether the failure of the Court of Civil Appeals to judicially determine the several fundamental and jurisdictional issues contained in petitioner's motions presented to said court, all to the

effect that the alleged September 28, 1925 contract is void and the judgment entered thereon is void on its face, *necessarily operated to wrongfully deprive* petitioner, the stockholders, and the corporation of their valuable oil property without there first being had a judicial determination of said issues, upon which alone such taking could be justified. Such procedure of the Court of Civil Appeals denied to them

(a) the "due process of law" guaranteed to them by the 14th Amendment of the Constitution of the United States, and

(b) also denied to petitioner and the stockholders "the privileges and immunities" to which they are entitled as citizens of the United States in violation of the 14th Amendment of the Constitution of the United States.

The Affirmative of the Foregoing Question is Fully Sustained by the Following Case Fayerweather v. Ritch

Fayerweather v. *Ritch*, 195 U. S. 276, 25 Sup. Ct. 58, 49 L. Ed. 193.

Fayerweather made a will containing 10 articles. The first 8 dealt with benefits left for his wife and two nieces, his nearest of kin and heirs at law. By the 9th article he gave a sum of $2,100,000 to be divided between 20 colleges. By the 10th he gave

the residue of his estate to his executors as trustees directing them to divide it equally among the colleges named in the 9th bequest.

At that time, according to New York law, a testator having husband, wife, child, or parent was forbidden to give to literary or benevolent institutions more than ½ of his estate.

Later the testator made a codicil to his will by which he revoked the 10th article and gave the residuary of his estate absolutely to his executors.

A few years later the testator died, at which time his estate amounted to 6 million.

When the will and codicil were propounded for probate the widow and nieces filed objections. The Surrogate Court admitted the will to probate but continued the contest as to the codicil.

The three executors executed a deed of gift by which they gave all the property left to them by testator to several parties named in the deed.

Thereafter the executor entered into a written agreement with the contestants by which the amount the latter were to receive under the will was increased and contestants agreed to withdraw their objections to the probate of the will and codicil when the codicil was also admitted to probate.

Then later the widow and the two nieces each gave the executors written releases.

A couple of years thereafter five of the colleges named in article 9 commenced suit against the executors and also executors of the will of Mrs. Fayerweather who had since died, the donees in the executors' deed of gift, the two nieces and the colleges of the twenty who did not join as plaintiffs.

The contention of the five colleges was that the codicil which gave the residue of the estate to the three executors, absolutely, was made in pursuance of an agreement that they should take the residue in trust for the colleges mentioned in the will and distribute it among them.

The donees answered and asserted the validity of the will.

The widow's executors and the nieces by their answer said that the agreement which the court was to enforce was a secret trust to evade the New York statute and that the releases were obtained from them by concealment and fraud, and therefore of no obligation.

The Supreme Court decreed that the residuary estate passed to the executors in trust for the colleges named in the 9th article of the will.

There was no formal finding of fact and no mention made in the decree of the specific claim of execu-

tors of Mrs. Fayerweather's will and the nieces that the releases were fraudulently obtained.

An appeal was taken to the Supreme Court Appellate Division which affirmed the decision.

A further appeal was taken to the Court of Appeals which also affirmed the judgment. A motion was made in this court to amend the remittitur so as to direct the Justice of the Supreme Court to consider the evidence given before him at the trial concerning releases *and to determine whether the said releases were valid and binding*, or invalid and void, which motion was denied.

Thereafter the two nieces instituted a suit in the Circuit Court of the United States making substantially all parties to the suit in the state courts defendants in this suit.

The complaint substantially was that plaintiffs in the state courts had alleged that the releases had been obtained fraudulently and were not binding on them; that thereupon it "became the duty of said court to adjudge and determine whether the releases therein described were invalid and whether these complainants were entitled an affirmative relief thereto." Neither did the Appellate Court of New York mention or pass upon that issue.

To the bills of plaintiffs in the Circuit Court of Appeals the defendants pleaded res judicata. This

was accompanied by an answer denying the fraud.

The Circuit Court sustained the plea and dismissed the bill.

Justice Brewer in writing the opinion of the Supreme Court of the United States sustaining the jurisdiction of the United States Supreme Court, said:

> "The contention is that by Article V of the Amendment to the Federal Constitution no person can be 'deprived of life, liberty, or property, without the due process of law'; that these plaintiffs were entitled to large shares of the estate of Daniel B. Fayerweather; that *they were deprived of their property by the judgment* of the Circuit Court, *which gave unwarranted effect to a judgment of the state courts;* that *this action of the Circuit Court is not to be considered mere error in the progress of a trial, but a deprivation of property under forms of legal procedure.* In Chicago, Burlington, etc. Railroad v. Chicago, 166 U. S. 226, *we held* that *a judgment of a state court might be here reviewed if it operated to deprive a party of his property WITHOUT the due process of law,* and that the fact that the parties were properly brought into court and admitted to make a defense was not absolutely conclusive upon the question of due process. *We said: 'But a state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statutes prescribing forms of procedure in the courts and give the parties interested the fullest op-*

portunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form.' This court, referring to the Fourteenth Amendment, has said: 'Can a State make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the State is of no avail, or has no application where the invasion of private rights is effected under forms of state legislation,' Davidson v. New Orleans, 96 U. S. 102. The same question could be propounded, *and the same answer made, in reference to judicial proceedings inconsistent with* the requirements of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the Fourteenth Amendment, *then the final judgment of a state court, under authority of which the property is in fact taken, is deemed the act of the state within the measuring of that Amendment.*"

And again (pp. 236, 237):

"'The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, *if the necessary result be to deprive him of his property without compensation.*"

"If a judgment of a state court can be reviewed by this court on error upon the ground that, *although the forms of law were observed, it necessarily operated* to wrongfully deprive a

party of his property (as indicated by the decision just referred to) a judgment of the Circuit Court of the United States claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in view of the prohibitory language of the Fifth Amendment, and thus involve the application of the Constitution. It is said that the right of these plaintiffs to share in the estate of Daniel B. Fayerweather is undoubted, unless destroyed by the releases they executed; that the fundamental question presented in the trial court of the state was the validity of those releases; that *notwithstanding this that court came to its conclusion and rendered its judgment without determination thereof;* that the appellate courts wrongfully assume that the trial court had decided the question, and rendered their judgments upon that assumption, so that the necessary result of the proceedings in the state courts was a deprivation of the rights of the plaintiffs to a share of the estate, *without any finding of the vital fact which alone* could destroy their rights. The contention is not that the state courts erred in their finding in respect to this fact, *but that there never was any finding.* Such decision of the state courts, made without any finding of the fundamental fact, was accepted in the Circuit Court of the United States as a conclusive determination of the fact. Although these plaintiffs were parties to the proceedings in the state courts and presented their claim of right, if it be true that the *necessary result of the course of procedure in those courts was a denial of their rights—a taking away and depriving them of their property* WITHOUT ANY JUDICIAL

DETERMINATION OF THE FACT UPON WHICH ALONE *such deprivation could be justified—a case is presented coming directly within the* decision in 166 U. S. supra, giving effect in the Circuit Court to the state judgment does not change the character of the question. *It is simply adding the force of a new determination to one wrongfully obtained,* and adding it *upon no new facts.* Whether the contention of the plaintiffs in respect to the character of the state proceedings can be sustained or not is a question on the merit and does not determine the matter of jurisdiction. That depends upon whether there is presented a bona fide and reasonable question of the wrongful character of the proceedings in the state courts and the necessary result therefrom. We are of the opinion that the jurisdiction of this court must be sustained."

While the legal conclusion based on the facts in the foregoing case are inescapable, yet the fact in the case at bar is even more absolute, and compelling. In the former case all the courts had jurisdiction of the parties and the subject matter. While, in the case now before this Court, no court, state or federal, has had, at any time, jurisdiction of either the parties or the subject matter. The jurisdiction of those courts has never attached to the parties or subject matter for the simple reason there was nothing to which the jurisdiction of those courts could attach. It's all just a nullity.

"A judgment pronounced without any judicial determination of the facts, which alone can support such a judgment is merely an arbitrary

edict of the Judge, and is as much wanting in due process of law as though the party against whom it is entered had received no summons. Chicago, Burlington, etc. R. R. 166 U. S. 226; Fayerweather v. Ritch, 195 U. S. 276, 298; 26 S. Ct. 58, 49 L. Ed. 193."

Hultberg v. *Anderson*, 252 Ill. 607, 97 N. E. 216.

The Right of a Litigant to Have the Court Determine the Issue Presented by Him, Particularly where It Is Charged that the Court is Without Jurisdiction, is a Fundamental Right Protected by the Privileges and Immunities and Due Process Clauses of the Fourteenth Amendment.

"The right to due process of law and exemption from compulsory self-accusation constitutes 'privileges and immunities' secured and protected by the Federal Constitution. USCA Const. Amend. 14 *United States* v. *Sutherland D. C. Ga.* 37 F. Supp. 344, 345." Words and Phrases, Per. Ed. Vol. 20, 1944, Annual Pocket Part. p. 26.

"The words 'privileges' and 'immunities' are of very comprehensive meaning, but it will be sufficient to say that the clause in the Constitution unmistakably procures and protects the rights of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; *to maintain actions in the courts of the state;*

Ward v. *State of Maryland*, 79 U. S. (12 Wall.) 418 430, 20 L. Ed. 449." Words & Phrases, Vol. 33, Perm. Ed. p. 781.

"The 'privileges and immunities' referred to in . . . the U. S. C. A. Const. Amend. 14 Sect. 1, prohibiting the abridgement of the privileges and immunities of citizens of the United States, are general abstract personal rights, in their nature fundamental, and pertain to all citizens in free governments, and which they are entitled to enjoy throughout the several states as well as in the state of residence, such as freedom of travel, ..., and *the right to resort to the courts for its protection* without restriction other than those usually affecting all persons. *Strange* v. *Board of Com'rs. of Grant Co.*, 91 N. E. 242, 173 Ind. 640; *Strange* v. *Board of Com'rs of Grant County*, 91 N. E. 506, Words & Phrases, Per. Ed. Vol. 33, p. 782.

"The right to have the state court proceed in trying a case so that the substantial rights of the parties under controlling federal law are protected, and the right to have controlling federal statutes given their true construction or application, as asserted by the party claiming such construction or application, so they will, in the evidence, warrant a judgment for such party, are federal rights or immunities, even though such statutes may not give the claimants a personal or affirmative right that could be enforced by suit against his adversary."

Cyc. Fed. Procedure, Vol. 10, p. 412, Sec. 4986.

See Garrett v. Moore-McCormick Co., 317 U. S. 725, 58 L. Ed. 1564, 63 Sup. Ct. 246. See many cases cited.

Fundamental rights cannot be taken away without due process of law. *Holden* v. *Hardy*, 169 U. S. 389, *Logan* v. *United States*, 144 U. S. 288, *Hurtado* v. *California*, 110 U. S. 535, *Caldwell* v. *Texas*, 137 U. S. 697.

There are private rights beyond the control of the State in every government. *Loan Ass'n.* v. *Topeka*, 20 Wall. 655.

A state has control of the procedure in its courts but cannot deprive citizens of fundamental rights. *Brown* v. *New Jersey*, 175 U. S. 175, *Bertholf* v. *O'Reilly*, 74 N. Y. 515, *West* v. *Louisiana*, 194 U. S. 258.

The main issue presented by petitioner's application for certiorari is predicated upon the six jurisdictional issues which the Court of Civil Appeals refused to determine or even mention. Each issue raises a jurisdictional question of much merit and is sufficient of itself not only to grant this petition but also to win the case on its merits, as will next be shown.

ARGUMENT

First Issue

The alleged September 28, 1925 contract is void

because it unlawfully attempts to delegate all the managerial powers of the Pratt-Hewit Corporation which it possesses by virtue of its charter and the laws of Texas and Delaware (as to the oil properties covered by the contract and which is all the property it has ever had) to be exercised by its own directors and officials, to the directors and officials of its main competitor, the Houston Oil Company, the principal defendant in this case.

The material portions of the contract are to be found in Exhibit 1 (Tr. R. 22 to 27). The entire contract is to be found on pages 876 to 887 of Fed. Tr. R.

Briefly, the September 28, 1925 alleged contract was an instrument whereby the Houston Oil Co. loaned to Pratt-Hewit Corp. various sums of money, possibly, all told, $100,000. The exact amount is not known. Each loan called for 6% interest and provided for the re-payment of the money with interest at a specified date and each loan was secured by a first mortgage lien on all the property, both personal and real, owned by the Pratt-Hewit Corp. The contract also required the Pratt-Hewit Corp to convey to the Houston Oil Co., *without consideration*, an undivided ½ interest in its 23,000 acres of oil and gas leases with two big producing gas wells on the leases, each capable of delivering 80 million cubic feet of gas into the pipe line, and also a ½ interest in all the drilling equipment, and casing, and machinery, and other personal property located on the leases. There is nothing in the contract to

show where the Houston Oil Co. paid one single dollar for this valuable undivided ½ interest. The loans were all paid with interest when they became due. The Pratt-Hewit Corp. was denied the right to drill on the joint leases. That right was reserved solely to the Houston Oil Co. The latter was given also the sole right to decide if and when and where drilling should take place. The Houston Oil Co. also alone had the right to market the gas and oil, fix the price, and name the party to whom the oil and gas should be sold.

The company to which the Houston Oil Company sold and still sells the gas was and is the Houston Pipe Line Company which it created, wholly owns, and completely controls and whose alter ego it is. The Houston Oil Company, in fact, sells the gas to itself. Of all cost of whatsoever nature, each must pay one-half.

The following is taken from "Part II" of the Contract (Tr. R. 22):

> "First Party (Pratt-Hewit Corp) agrees and binds itself to grant, bargain, sell and convey unto Third Party (Houston Oil Co.) an undivided one-half (½) interest in and to all those certain oil and gas leases, as follows: (List of eleven oil leases totaling 23,000 acres, omitted, all situated in Refugio County, Texas). (For this undivided ½ interest the Houston Oil Co. was not required and did not pay one single dollar).

"Said undivided one-half interest in said leases to be conveyed as aforesaid by First Party to Third Party

(1) "together with an undivided one-half (½) interest in all oil and/or gas wells on the property covered by said leases.

(2) "together with the equipment of every kind and character of said wells, and

(3) "together with all personal property on the lands covered by said leases, and used in connection with the development or proposed development thereon.

(4) "So that, and to the end that said leases, said wells, and said equipment shall be owned one-half (½) by First Party and one-half (½) by Third Party.

"Upon the conveyance to Third Party by First Party of the said undivided one-half (½) interest, *Third Party* (Houston Oil Co.) shall have the exclusive right

(1) "to operate and produce oil and/or gas from the wells on said property, and

(2) "to the use of the equipment used in connection with said wells, and

(3) "to *contract* and *sell*, and

(4) "*sell* such production,

(5) "receive the proceeds of sale, and

(6) "do any and all things in connection with the handling and management thereof *as Third Party may deem best.*

(7) "Third Party shall also have the *exclusive* right to drill other wells for the production of oil and/or gas, on said property, and

(8) "Third Party shall proceed to develop and produce oil and/or gas therefrom *as and in the manner Third Party may deem best.*

(9) "*the intention being that the opinion and judgment of Third Party* as to such development *SHALL CONTROL.*

"All of the costs and expenses incurred by Third Party

(1) "in operating and producing oil and/or gas from the wells now on said property, and

(2) "in drilling additional wells and producing oil and/or gas therefrom, and

(3) "in marketing oil and/or gas

(4) "and all other costs and expenses incident thereto or by reason thereof, shall be borne one-half (½) by First Party and one-half (½) by Third Party.

(5) "The proceeds of the sale of oil and/or gas from all such wells shall be owned one-half

(½) by First Party and one-half (½) by Third Party."

(6) "Should minerals other than oil and gas be produced from said property, then same shall be owned in the same proportion, and produced, handled and sold in the same manner as oil and gas."

These two above quoted paragraphs in themselves make the Contract void, because

(a) By this instrument the officers and directors of the Pratt-Hewit Corp. have attempted to divest themselves of all the managerial powers and the duties they owe their corporation vested in them by Texas and Delaware statutes and the charter of their corporation and have attempted to delegate those powers and the duty going with them to the directors and officials of the Houston Oil Co., a competitor in the same area, leaving themselves stripped of everything except the clerical duty to distribute among the stockholders whatever the Houston Oil Co. shall choose to give them. Thus, for a period of nearly 20 years the directors and officials of the two Pratt-Hewit Corporations have had nothing to do except to be the "rubber stamp" of the officials of the Houston Oil Co. and to distribute among the stockholders of the Pratt-Hewit Corp. the allotted dividends that total to the magnanimous amount of 8½ per cent. (F. Tr. R. 707).

The Pratt-Hewit Corp, under this Contract, does not have the right to drill for oil or gas on its own

property—a right which every tenant-in-common has at all times, assuming that the contract is legal, which petitioner denies. Consequently, if the Houston Oil Co. decided not to do any drilling in any one year or period of years, there is no provision in the contract which would compel it to do so, for there is no provision in the contract which compels the Houston Oil Co. to produce a minimum amount of gas or oil each year, nor is there any provision that a certain amount of development drilling must be done each year—*all that is left to the discretion of the directors of the Houston Oil Co.*

These provisions, contained in the foregoing quoted paragraphs of the alleged contract, vest with the Houston Oil Co. the exclusive right to operate and produce oil or gas from the alleged joint property, to use the Pratt-Hewit Corp's equipment situated on the properties, "to contract to sell and sell such production, receive the proceeds of sale, and to do any and all things in connection with the handling and management thereof as the Third Party (Houston Oil Co.) may deem best." . . . . . The Houston Oil Co. was also given the EXCLUSIVE RIGHT to drill other wells for the production of oil or gas. "*Intention being that the opinion and judgment of the Houston Oil Co.* as to such development SHALL CONTROL." All costs and expenses incurred in operating and producing oil and gas, and marketing the oil and gas, and all other costs and expenses incident thereto shall be borne ½ *by the Pratt-Hewit Corp.* and ½ by the Houston Oil Co. Likewise, the proceeds of the sale of oil and gas should be owned

½ by the Pratt-Hewit Corp. and ½ by the Houston Oil Co. There is no time limit placed as to these provisions, and, it therefore means that as long as oil and gas and other minerals may be produced from said property the contract, if it were legal, would be enforced.

. . . . . .

(b) By this Contract the Houston Oil Co was given the *exclusive right* to market the oil and gas and other minerals sold at a price determined by the Houston Oil Co. alone and sold to the party which the Houston Oil Co. alone had the right to select.

Attention is called in particular to that part of the Contract which vests with the Houston Oil Co. the *exclusive right* "to contract to sell, and sell such production, receive the proceeds of sale." This phraseology carries with it the *right to fix the price* without in any way consulting the alleged co-tenant, the Pratt-Hewit Corp. The Houston *Pipe Line* Company, to whom the gas was and is sold, was organized by the Houston *Oil Co.* in 1925, and is the *alter ego* of the Houston Oil Co. See paragraph XIV of the Proposed Amended Original Petition of F. F. Dollert (Tr. R. 19). *Consequently, the Houston Oil Co. was and is fraudulently selling* the gas produced *to itself. It*, therefore, *sits on both sides of the bargaining table when the price of gas is fixed.*

(c) The Houston Oil Co. sold the gas to itself —The Houston Pipe Line Company—the *alter ego* of the Houston Oil Co.

Paragraph 28 of Plaintiff's Second Amended Complaint (Fed. Tr. R. 336, 337) in the Federal District Court, reads as follows:

"(28) The plaintiff alleges the allegations in this paragraph upon information and belief, as follows: The Houston Pipe Line Company is the second self —the alter ego—of the Houston Oil Company. The latter owns all the stock of the former and brought about its incorporation, and furnished it with funds. The two companies have the same directors, except that the Houston Pipe Line Company has fewer in number. The two companies have the same secretary treasurer. They also have the same office files, and occupy the same office space. Each year the two companies issue a joint financial set-up. The officers and directors of the parent company, the Houston Oil Co., dominate and control the affairs and business of the Houston Pipe Line Company so that the latter is but a mere instrumentality and a screen for the other. The Houston Pipe Line Company on or about March 12, 1925 was organized by the Houston Oil Company about the same time that the contract of September 28, 1925 was being contemplated by the officials of the Houston Oil Company and Thomas H. Pratt. The natural gas which the Houston Oil Company, since September 28, 1925, produced and now produces from the wells it operates on the Pratt-Hewit Oil Corporation (Delaware) properties, is sold by the Houston Oil Company to the Houston Pipe Line Company which perpetrates a fraud, in that it represents that it is sell-

ing the gas of the Pratt-Hewit Oil Corporation (Delaware) to a third, separate and distinct party, when, in fact, the transaction means a sale of gas to itself and that the Houston Oil Company is both buyer and seller and has absolute power to fix the prices and also to make a charge in the nature of a profit in the marketing of the gas which the September 28, 1925 contract forbade." (Fed. Tr. R. 336, 337) (Paragraph XIV of petitioner's proposed Amended Petition is the same except as to a minor addition.)

The answer of the Houston Oil Company and the Houston Pipe Line Company in the Federal case, the latter being a defendant in that case, to said paragraph 28 and 29 reads as follows:

"(28) As to Paragraph 28 thereof; and (Fed. Tr. R. 373)

"(29) As to Paragraph 29 thereof:

> "These defendants allege that the Houston Pipe Line Company is a separate and distinct corporation from the Houston Oil Company of Texas, and that it was incorporated under the laws of the State of Texas, and that though some of the officers and directors of the two corporations are the same, each has its own offices and records, and each conducts its own business." (Fed. Tr. R. 373, 374)

According to the Rules of the Federal Practice, the rule has always been and still is that every alle-

gation in plaintiff's complaint which is well pleaded is admitted.

The answer contains a negative pregnant in that it does not unequivocally deny the allegations of the complaint and therefore is pregnant with admissions of the Material Allegations in the paragraph.

An oil company whose directors and officials do not have the right to manage the production and marketing of its own oil and gas but must defer to the judgment of the officials of some other company, a natural competitor, has left its success entirely within the hands and control of such other company.

According to both Texas and Delaware statutes, the last being the state in which the Pratt-Hewit Corp is organized, the officers and directors of a corporation may not delegate the powers vested with them by the charter of their corporation and the statutes of the state in which the corporation is incorporated or in which it carries on its business to the officials and directors of another corporation. Such a contract is void in its inception.

Art. 1327 of the Texas Vernon Statutes, provides that—

> "The directors shall have the general management of the affairs of the corporation, etc."

Revised Code of Delaware, Laws of 1935, Corporation Art. 2041, provides:

"The business of every corporation organized under the provisions of this chapter shall be managed by a board of directors, except as hereinafter or in its certificate of incorporation otherwise provided." etc.

"The general management of the affairs of a corporation having been entrusted by the legislature to the board of directors, it accords with general principle to hold that *their functions may not be delegated to others.*" 10 Tex. Jur. 954, Sec. 303. See other cases cited.

"Upon this statement the question arises, can the board of directors of a corporation, under a charter which imposes upon it the entire management of its affairs, confer that authority upon an executive committee, to be appointed by the president of the company? Undoubtedly, the board of directors can appoint an agent whether in the form of committees or as single agents, to transact the ordinary business of the corporation; but we believe the rule is well settled by authority, and sustained by sound principle, that a *board of directors* CANNOT CONFER UPON OTHERS THE POWER TO DISCHARGE DUTIES IMPOSED UPON THEM WHICH INVOLVE THE EXERCISE OF JUDGMENT AND DISCRETION, *except* in the transaction of ordinary business of the corporation, UNLESS authorized so do to by the charter. Thomp. Corp. Sec. 3944, et seq; Green's Brice, Ultra Vires, pp. 490-492; Railroad Co. v. Ritchie, 40 Me. 425; Tippets v. Walker, 4 Mass. 595; Weidenfeld v. Railroad Co., 48 Fed. 615. The by-laws in express terms substituted the executive committee, to be appointed by the

president, for the board of directors, and attempted to confer upon that committee all powers given by the charter to the board of directors. Such a provision in the by-laws is so palpably in conflict with the charter under which the corporation was organized that there could scarcely be a question that the by-laws would be absolutely null." Temple v. Dodge, et al, 32 S. W. 514 (Tex. Sup. Ct.)

"The power to manage the affairs of the corporation was placed by statute and by charter in the Board of directors (Art. 1327, R. S. Texas, 1925), and such authority CANNOT BE DELEGATED TO ANOTHER (Temple v. Dodge, 32 S. W. 514, 33 S. W. 222), and those who deal with a corporation are charged with knowledge of the limitations upon its powers prescribed by its charter." Farmers' Gin Co. v. Kasch, 277 S. W. 756, 749 (Tex. Civ. App.)

"Further, in Temple v. Dodge, et al, 89 Tex. 69, 32 S. W. 514, 33 S. W. 222, it was held that the board of directors cannot delegate to others authority to discharge the duties imposed upon them by law, *involving the exercise of judgment and discretion*, except in the transaction of ordinary business of the corporation, unless authorized so to do by its charter. To the same effect, see Fletcher on Private Corporations, Vol. 3, pp. 31, 48." Marchman v. McCoy Hotel Operating Co., 21 S. W. (2d) 552, 558 (Tex. Civ. App.).

In the case of *Sherman & Ellis, Inc.* v. *Indiana Mutual Gas Co., et al.*, 41 Fed. (2d) 588 (7th Cir.), the court HELD VOID an agreement made between

the Sherman & Ellis Inc. and the Indiana Mutual Casualty Company in which the Casualty Company conferred the management of its affairs upon the Sherman & Ellis, Inc. *for a period of* 20 *years.*

The Court said: (Evans, Circuit Judge)

"It is true the statutes of the states authorizing the organization of corporations are of a general application and are easily complied with. Yet we cannot believe that the requirements therein found or the official duties therein prescribed are mere formalities or only directory in character . . . . . *The grant of a corporate power by a state is upon the hypothesis that these powers shall be exercised by the corporation's officers,* annually elected by the stockholders, and not by the officers of another corporation." Anglo-American Land, etc. Co. v. Lombard (CCA) 132 F. 721, 736.

"The state is presumed to grant corporation franchises in the public interest, and to intend that they *shall be exercised through proper officers and agencies of the corporation and does not contemplate that the corporate powers will be delegated to others. Any conduct which destroys their functions or cripples their separate activity, by taking away the right to freely and independently exercise the functions of their franchises, is contrary to public policy.*" McCutcheon v. Merz Capsule Co. (CCA, 6th) 71 F. 787, 793. The Circuit Judges were Taft, Lurton and Hammond.

". . . . . *a contract not within the scope of the powers conferred on the corporation CAN-*

NOT BE MADE VALID by the assent of everyone of the shareholders, nor can it by any partial performance become the foundation of a right of action." Thomas v. Railroad Co., 101 U. S. 71, 83.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

SECOND ISSUE

The September 28, 1925 Contract Violates the Texas Usury Statute and Therefore is Void

The September 28, 1925 contract violates the Usury statutes of Texas and, therefore, is void. It was neither an oil and gas lease assignment nor an oil and gas operating contract but a pure loan contract. It provided for four different loans of money by the Houston Oil Company to the Pratt-Hewit Corp. Each carried interest at the rate of 6% per annum and was secured by the Pratt-Hewit Corp. giving a mortgage upon all of its property, real and personal, which it had left after conveying a one-half undivided interest to the Houston Oil Company pursuant to said alleged contract and which consisted of 23,000 acres of oil and gas leases on which there were two producing wells, each capable of putting into the pipe line eighty million cubic feet of gas per day (see Testimony of A. D. Rooke, F. Tr. R. p. 836) plus much pipe line, and very valuable drilling equip-

ment. Each one of these loans was repaid with interest when it became due. The Houston Oil Company alone, by virtue of The Contract, had the right to drill for, produce, and market the oil and gas, and by the contract also had the right to apply the proceeds from said production to repay the loans to itself out of the production share going to the Pratt-Hewit Corp.

For the making of these loans the Houston Oil Company exacted a **bonus** from the Pratt-Hewit Corp requiring the latter to convey to it an undivided one-half interest in the 23,000 acres of oil and gas leases; in the two big gas producing wells on this acreage; all of the drilling equipment owned by the Pratt-Hewit Corp; the pipe lines of the Pratt-Hewit Corp, and a one-half interest in ALL of the production coming from the two producing wells, and the wells to be drilled thereafter. NOT ONE SINGLE DOLLAR WAS PAID FOR THIS ONE-HALF INTEREST BY THE HOUSTON OIL COMPANY to the Pratt-Hewit Corp.

The Contract is usurious in that the loans all carried 6% interest and **the giving** to the Houston Oil Company a **one-half interest in the leases,** the two producing wells each capable of producing 80 million cubic feet of gas per day, (F. Tr. R. p. 836) and equipment, raised the interest rate far in excess of 10% and is, therefore, prohibited by Art. 5069 of the 1925 Texas Statutes, which says:

"Usury is interest in excess of the amount

allowed by law (10 per cent); all contracts for usury are contrary to public policy and shall be void."

There was another provision in the Contract which was to the effect that, as to the two producing wells, No. 4 and No. 6, the proceeds from the first production from these wells, to the extent of ing wells, No. 4 and No. 6, the proceeds from the $120,000, the Houston Oil Company was to apply to paying itself the loans which it had extended to the Pratt-Hewit Corp. (Fed. Tr. R. 881)

In fact, all of this $120,000 is paid by the Pratt-Hewit Corp. Sixty thousand ($60,000) dollars of this comes from the remaining undivided one-half interest the said corporation had after the Contract was executed. **The other $60,000 did not come from the treasury of the Houston Oil Company** BUT FROM THE PRODUCTION coming from the undivided one-half interest which the Houston Oil Company claimed by virtue of the alleged and void Contract —a gift to it by Pratt and the directors of the Pratt-Hewit Corp. That claim of the Houston Oil Company assumes the legality of the September 28, 1925 contract—**the question in dispute**. That claim of the Houston Oil Company "begs the question."

For the Houston Oil Company to give back to the Pratt-Hewit Corp. that which the Houston Oil Company, in the first place, had no right to exact from the latter **does not constitute a consideration**.

Art. 5071, Texas Statutes, says:

> "The parties to any written contract may agree and stipulate for any rate of interest NOT EXCEEDING ten percent per annum on the amount of the contract, and all written contracts whatsoever, which may in any way, **directly or indirectly**, provide for a greater rate of interest SHALL BE VOID and of no effect for the amount of interest only; but the principal sum of money or value of the contract may be recovered."

Judge Hutcheson of the Fifth Circuit Court of Appeals, and who is a member of that court coming from Texas, in the case of Atwood v. Deming Inv. Co., 85 Fed. (2d) 180—a suit involving the just quoted Texas Statutes, said:

> "For us, the statute (Art. 5071) has the meaning which the highest court has given it. We follow where the court has led."

> The courts of Texas have always struck such contracts down, and neither sophistry of form nor substance has availed to save them. The reasons for this, the Supreme Court of Texas in the cases referred to, have been fully set out. We shall not attempt a restatement; a reference to these cases will suffice."

> "The language of the statute, that such contracts shall be void as to interest, is imperative and absolute, not prospective and conditional. It provides not that the contract will, but that it shall, be void and of no effect as to interest. Such

a statutory interdiction sweeps the provisions for interest out of the contract, and leaves it as though it did not stipulate for the interest." (p. 183)

The application of these statutes and decisions of the courts of Texas to the September 28, 1925 contract, means that the actual money, the principal checked out by the Houston Oil Company out of its bank account in making the loan must be and **was paid back** to the Houston Oil Company by the Pratt-Hewit Corp for that part of the contract has the sanction of the laws of Texas. Principal with interest was fully paid. The interest part of the contract is completely condemned by the two Texas statutes just quoted and the decisions of the Texas Supreme Court. The void part includes two items which cover all the rest of the Contract, namely, first, the 6% interest provided for by the written loans and second, the undivided one-half interest in all the real and personal property conveyed to the Houston Oil Company by the Pratt-Hewit Corp., according to Texas laws, is interest, thus bringing the rate far above the 10 per cent allowed. This makes the Contract, as to all interest—the 6 per cent, as well as the undivided one-half interest conveyed to Houston Oil Company by Pratt-Hewit Corp, void. Thus, in fact, the Houston Oil Company at no time acquired ownership of the one-half interest it received from the Pratt-Hewit Corp. As to this one-half interest, and all the production therefrom, the Houston Oil Company is a **mere constructive trustee** with the Pratt-Hewit Corp the cestui que trust.

In the case of Manning, et al v. Christianson, et al (Tex. Com. App.) 81 S. W. (2d) 54, the decision of the Court of Civil Appeals was sustained, when the Court said:

> "Entire interest is usurious if any part of interest is usurious. 59 S. W. (2d) 234, in the following language:
>
> "It follows, therefore, the Court of Civil Appeals correctly held that the contract was usurious and that all provisions with references to interest were void."

In the case of Shropshire v. Commerce Farm Credit Co. (Tex. Sup. Ct.) 39 S. W. (2d) 11, (one of the cases quoted by Judge Hutcheson in the Atwood v. Deming Inv. Co. supra) the Supreme Court of Texas said:

> "The court recognizes its duty in determining the validity of the contract herein involved to apply the universally accepted rule declared in Galveston Co. v. Guynes, 63 S. W. 860, 861, 64 S. W. 778, in the following words: 'to determine the question of **usury** in a contract, **it must be tried by the statutory limitations of 10 per cent per annum** for the use, forebearance, or detention of the money for one year. **If the interest contracted for exceeds that rate, it constitutes usury, no matter in what form the contract may be expressed.** The court must give to the terms of the contract, if fairly susceptible of it, a construction that will make it legal, but **has no right to depart from the terms** in which

it is expressed **to make legal what the parties have made unlawful."**

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

THIRD ISSUE

The contract is void in that it violates the Anti-Trust and Anti-Monopoly Statutes of Texas.

What has just been said in this brief about the September 28, 1925 contract being void because it attempted to delegate all the managerial powers vested with the directors and officials of the Pratt-Hewit Corp, to the directors and officials of the Houston Oil Company, its competitor in the same area, is equally cogent a proof that the contract violates the Anti-Trust and Anti-Monopoly Statutes of Texas.

As has just been seen, the Houston Oil Company, by the Contract

(1) has the exclusive right to control the production of all the oil, gas, and other minerals as long as either is produced from the 23,000 acres, that is **when** and **how much:**

(2) has the exclusive right to market the oil

(a) fix the price,

(b) and decide to whom the oil and gas is to be sold.

If this contract is legal and does not violate the Anti-Trust and Anti-Monopoly Statutes of Texas and of the United States, then it would be legal for the Houston Oil Company to make similar contracts with companies A, B, C, D, E, ad infinitum—an exceedingly easy way of avoiding the Anti-Trust and Anti-Monopoly laws of both state and federal governments and at the same time obtain absolute control of all production and the fixing of all prices and controlling all markets of anything produced or manufactured.

The two paragraphs of Part II of the Contract are not here repeated nor the discussions of the First Issue.

1. Statutory Definitions of Anti-Trust and Monopolies.

Art. 1632, Vol. 3, Vernon's Texas Penal Code, defining trusts—

> "A 'trust' is a combination of capital, skill or acts by two or more persons, firms, corporations or associations or persons, or either two of them for any or all of the follwing purposes:
>
> 1. To create, or which may tend to create or

carry out, restrictions in trade or commerce or aids to commerce, or in the preparation of any product for market or transportation, or to create or carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this state.

"2. To fix, maintain, increase or reduce the price of merchandise, produce, or commodities, or the cost of insurance, or of the preparation of any product for market or transportation.

"3. To prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce, or commodities, or the business of insurance, or to prevent or lessen competition in aids of commerce, or in the preparation of any produce for market or transportation.

"4. To fix or maintain any standard or figure whereby the price of any article or commodity of merchandise, produce or commerce, or the cost of transportation, or insurance, or the preparation of any product for market or transportation, shall be in any manner affected, controlled or established.

"5. To make, enter into, maintain, execute or carry out any contract, obligation or agreement by which the parties thereto bind, or have bound, themselves not to sell, dispose of, transport or to prepare for market or transportation any article or commodity, ...

. . . .

"7. To abstain from engaging in or continuing

business, or from the purchase or sale of merchandise, produce, or commodities partially or entirely within this state, or any portion thereof." p. 328-329. (Same as Art. 7426 of the Texas Revised Statutes relating to Trusts).

ART. 1633, Vol. 3, Vernon's Texas Penal Code—Defining Monopoly—

"A 'monopoly' is a combination or consolidation of **two** or more corporations when effected in either of the following methods:

"1. When the direction **of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or** where such common management or control tends to create a trust as defined in the first article of this chapter.

"2. Where any corporation acquires the shares or certificates of stock or bonds, franchises or other rights, **or the physical properties,** or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening or where the effect of such acquisition tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise. (id)" p. 332. (Same as Art. 7427 of Texas Civil Statutes relating to Monopolies).

All agreements and contracts made in violation of the Anti-Trust and Anti-Monopoly statutes are void. Art. 7437, Vernon's Texas Civ. Statutes.

The definite effect of the September 28, 1925 alleged contract was to place the production and marketing of the oil and gas produced on the Pratt-Hewit Corp leases under the absolute management and control of the Houston Oil Co. and thereby eliminate completely and forever, that is, as long as oil or gas or any other mineral is produced in the 23,000 acres, the Pratt-Hewit Corp. as competitor to the Houston Oil Company in producing, selling, and fixing the price at which oil and gas would be sold in South Texas.

> *Headnote:* "A contract for the sale of one corporation to another of all its gas wells, the purpose and effect of which would be to prevent competition between them in supplying gas to communities held to effect an illegal trust and void under this article and Articles 7796 and 7797, and 7807 Vernon Sayles' Ann. Civ. St. Texas, 1914." Empire Gas & Fuel Co. Inc. v. Lone Star Gas, Inc., 289 F. 826.

The Court in the above case on page 832, said:

> "The decision of the courts of Texas construe liberally these anti-trust regulations. If the undertaking between the plaintiff and the defendant would result in a diminution of competition, then and in that event the agreement upon which this action is based, and for the performance of which the plaintiff prays would be illegal and against public policy."

Texas Statutes have greatly enlarged upon the common law pertaining to trusts and monopolies.

"Our anti-trust statutes have materially enlarged upon the common law. They denounce and make illegal, void and criminally punishable almost every conceivable kind of combination or contract which *tends* to restrict trade or commerce." 29 Tex. Jur. 749. North Texas Gin Co. v. Thomas, (Tex. Civ. App.) 277 S. W. 438, Error refused. State v. Gulf Refining Co. (Civ. App. Tex.) 279 S. W. 526, Error refused.

Texas Anti-Trust laws ignore distinction between *reasonable* and *unreasonable* restrictions.

"The act denounces combinations in restraint of trade and makes no distinction between restrictions which are reasonable and those which are unreasonable." Anheuser-Busch Brewing Ass'n. v. Housch (Tex. Sup. Ct.) 88 Tex. 184, 30 S. W. 869.

Courts will not speculate on the extent of the injury resulting to public arising from an illegal trust statute violation.

"The effect on the public of an agreement which is against public policy as defined by the statute is not important: its *tendency* may be enough to bring it within the condemnation of the law. State v. Racine Sattley Co., 63 Tex. Civ. App. 663, 134 S. W. 400. That a contract necessarily and *naturally tends to bring* about the inhibited result is the test to be applied to cases arising under this law. Queen Insurance Co. v. State, 86 Tex. 250, 24 S. W. 397, 22 L. R. A. 483, reversing (Civ. App.) 22 S. W. 1048; Potomac Fire Ins. Co. v. State (Civ. App.) 18

S. W. (2d) 929, Error refused; Uvalde Rock Asphalt Co. v. Chapin-Colglazier Constr. Co. (Civ. App.) 299 S. W. 710, Error refused. Nor does it matter that the immediate result of the combination may be a reduction in the price of commodities. San Antonio Gas Co. v. State, 54 S. W. 289, Error refused. 'If the combination be one to create or carry out restrictions in trade or commerce or aids in commerce, no matter what may be the result of the combination, the law has been violated. *The law does not look to results.*' San Antonio Gas Co. v. State (Supra)." 29 Tex. Jur. 753.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

FOURTH ISSUE

The September 28, 1925 contract and the judgment entered thereon, January 26, 1937, are further void because Thomas H. Pratt, the resident manager and dominant stockholder, director, secretary and treasurer of the Pratt-Hewit Corp who attempted to negotiate this contract in behalf of his corporation, had disqualified himself from negotiating that instrument by reason of the undisputed and admitted fact that he had and was having secret private financial dealings with the Houston Oil Company, whereby he was attempting the impossible in law and fact, namely, serving dual conflicting interests.

The Houston Oil Company and its president, E.

H. Buckner, secretly paid to Pratt a sum somewhat more than $51,000 in cash and obtained for him a 3/32 undivided interest in a producing 200 acre oil lease from which he received an income of at least $125,000 up to the time of his death. To show just how this was accomplished, for brevity's sake, reference is made to petitioner's proposed amended petition where the many acts in which Pratt's private interest conflicted with duty are recited. (Tr. R. 10 to 17)

Officers and Directors of a Corporation are Fiduciaries.

"And it is settled law in this state that the officers and directors of a corporation occupy a fiduciary relationship to the stockholders and act in the capacity of a trustee for them. 10 Tex. Jur. 861, Sec. 70, and numerous cases cited in Note 6: also Tex. Jur. 21, Sec. 372." Trinity Universal Ins. Co. v. Maxwell, 101 S. W. (2d) 606, 611 (Appeal dismissed)

An Officer's Right of Representation Ceases the Moment Conflict of Interest Arises, and "The Law Does Not Stop to Inquire whether the Contract was Fair or Unfair".—Justice Cardoza.

In the case of *Nabours* v. *McCord*, 80 S. W. 595, This Honorable Court said:

"*No man can in this court*, as an agent, *be allowed to* put himself into a position in which *his interest and his duty will conflict.*

"*This court will not inquire*, and is not in a position to ascertain, *whether the bank had lost or had not lost* by the act of the directors."

In the same case this Honorable Court gives the reason why the law should be such in a relationship between a fiduciary and his beneficiary, when it said:

"The rule is founded on the *danger of imposition* and the presumption of the *existence of fraud inaccessible to the eye of the court.* The policy of the rule is to shut the door against temptation, and which, in the case in which such relationship exists, is deemed to be itself sufficient to create the disqualification." Nabours v. McCord, supra, pages 598 and 599.

"*A purchase by the trustee may be set aside without regard to its fairness or price paid.* Nabours v. McCord, 97 Tex. 526, 80 S. W. 595, 598, *because*, '*it is poisonous in its consequences*,' Crawford County Bank v. Bolton, 87 Ark. 142, 118 S. W. 398, 400, and *the rule stands 'upon one great moral obligation* to *refrain from placing ourselves in relations which* ordinarily *excite a conflict between self-interest and integrity.*'" Kreis 1. Kreis, 57 S. W. (2d) 1107, 1109, (Tex. Civ. App.)

Justice Rosenman:

"In such a situation (where conflict arises between the interest of fiduciary and that of cestui) the language of Justice Cordoza in Wendt v. Fischer, 243 N. Y. 439, 443, 154 N. E. 303, 304, is apt: 'Finally, we are told that the *broker acted in good faith*, that the *terms*

procured were the best obtainable at the moment, and *the wrong, if any, was unaccompanied by damage.* BUT THIS IS NO SUFFICIENT ANSWER *by the trustee forgetful of his duty. The law 'does not stop to inquire whether the contract or transaction* was *fair or unfair. It stops* the *inquiry when the relation is disclosed, and sets aside the transaction or refuses to enforce it*, at the *instance of the party whom* the *fiduciary undertook to represent, without undertaking to deal with* the *question* of *abstract justice* in the particular case.' Munson v. Syracuse G. & C. R. R. Co., 103 N. Y. 56, 74, 8 N. E. 355; cf. Dutton v. Miller, 52 N. Y. 312, 319. *Only by this uncompromising rigidity has* the *rule* of *undivided loyalty been maintained against disintegrating erosion.'*" Blaustein v. Pan American etc. Co., 21 N. Y. S. (2d) 651, 722.

"The rule is based upon the public policy of removing temptation from the office of a fiduciary, so that it will not be necessary to determine whether it was the interest of the trustee or his sense of duty that prevailed. Different courts have defined this rule in different words, but in unanimity of substance." Blaustein v. Pan Amer. etc. Co., 21 N. Y. S. (2d) 651, 722.

In the case of *Wile, et al* v. *Burns*, 265 N. Y. S. 461, the Court said:

"They say that they have clearly established that no one occupying a fiduciary relation, such as that of a director of a corporation, should place himself in a position where his self-interest *will* or *may conflict with* his *duties* as *trus-*

tee, and that, *if he does do so, his right to represent his cestui ceases at once.*"

All the foregoing cases, including the decisions of Texas courts, restate and fully affirm the Biblical adage that "No man can serve two masters."

The Undivided 3/32 Interest in the A. D. Rooke 200 Acre Lease Presents a Continuous Conflict Between Duty and Self-Interest which is Still Going On.

The attempt to serve dual conflicting interests and the bribing of officials of the Pratt-Hewit Corp, which cannot be severed from the acts which constitute the conflict between interests, still goes on as a challenge to the courage of courts of justice. When the Houston Oil Company and its president, E. H. Buckner, paid Pratt a sum in excess of $51,000 cash, those bribes were completed when the money was paid.

The making by the Houston Oil Company of a gift of an undivided 3/32 interest in the A. D. Rooke lease through the channels of A. D. Rooke and his lease and the drilling contracts made between Rooke and the Houston Oil Company and the assignment by Rooke of a ½ interest in the A. D. Rooke lease for which Pratt paid nothing—that presents a different situation. The nature of that conflict between self interest and duty is far different. The production income could not be paid out at once. That, at its inception, contemplated between Pratt

and the Houston Oil Company that a payment of monthly checks from the production of oil and gas and other minerals coming from the 3/32 interest which Pratt still had left in the A. D. Rooke lease, was to continue so long as oil or gas or other minerals were produced from the Rooke 200 acre lease. This production from that lease commenced about September 1, 1925 and has continued without interruption ever since, during all the time that this litigation has gone on through the federal and state courts and is going on now, that is, the Pratt heirs are receiving a check from the Houston Oil Company every month and the Houston Oil Company, is flaunting its disregard of law and courts while this case is pending before this Honorable Court. Yes, and it was continuing in secret and unbeknown to the stockholders of the Pratt-Hewit Corp and petitioner on January 26, 1937 when this case was dismissed with prejudice by the Honorable J. P. Pool. Pratt and his family have received the $51,000 and the $125,000 and this income from this 3/32 interest, but the distant investors who put about $500,000 into this venture, dating back to 1920, have received a total income on their investment of 8½%.

The Houston Oil Company's giving and Pratt's accepting the 3/32 interest in the A. D. Rooke lease at the time that the deal was made in 1925 contemplated that these checks were to be paid by the Houston Oil Company and were to be received by Pratt as long as oil and gas were produced on the A. D.

Rooke lease. This constituted a continuous conflict between Pratt's interests and his duty to his corporation. After Pratt's death, September 3, 1938, the conflict between interest and duty continued through M. A. Shaw, Pratt's son-in-law, who became the president and one of the directors of the Pratt-Hewit Corp and is still such president and who received a large block of stock as a gift from his wife, Laura J. Shaw, the daughter of Thomas H. Pratt, who had received it from her father by gift and inheritance, and continued it through George P. Pratt, Thomas H. Pratt's son, who became a director shortly after his father's death and has held the position ever since.

This is not an ancient case but one where the wrong, that is, the unlawful deprivation of petitioner and the stockholders and the corporation of their oil properties without there first having been a judicial determination of the validity of the September 28, 1925 contract, has been going on every day since September 28, 1925 and is still going on today.

This is true, even though petitioner, ever since the discovery of the secret financial dealings between Pratt and the Houston Oil Company, has been knocking at the doors of Justice, his complaint being presented to the courts but being refused a judicial determination of such issue, the unwarranted result being that petitioner et al's property is being continuously taken by the Houston Oil Company in violation of the Due Process Clause and also the privileges and immunities clause of the 14th Amendment of the United States Constitution without a

judicial determination of the issues presented, by which alone such deprivation can be justified.

A crime or a bribe, whether civil or criminal, is continuous when the series of unlawful acts are set on foot by a single impulse and operated by an intermittent force, however long it may occur.

> "A continuous crime is a continuous unlawful act or series of acts set on foot by a single impulse and operated by an intermittent force, however long it may occur. Armour Packing Co. v. United States, 153 F. 1, 5, 82 C. C. A. 135, 14 L. R. A. (N. S.) 400, citing Whar. Cr. Pl. & Practice, 9th Ed. Secs. 473 and 474; People v. Sullivan, 33 p. 701, 704, 9 Utah 194." 9 Words & Phrases, Perm. Ed. 174.

Justice Holmes, in the case of *United States* v. *Kissel*, 218 U. S. 607, 608, 31 S. Ct. 124, 126, said:

> "The defendants argue that a conspiracy is completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the continuando may be disregarded and a plea is proper to show that the statute of limitation has run. Subsequent acts in pursuance of the agreement may renew the conspiracy, or be evidence of a renewal, but do not change the nature of the original offense. So, also, it is said, the fact that an unlawful contract contemplated future acts or that the results of a successful conspiracy endure to a much later date does not affect the character of the crime.

"The agreement, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agreement is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfied the definition of the crime, but it does not exhaust it. It is true, of course, that the mere continuance of the result of a crime does not continue the crime. United States v. Irving, 98 U. S. 540. But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and when there is such continuous cooperation, it is a perversion of natural thought and language to call such continuous cooperation of a cinematographic series of distinct conspiracies, rather than to call it a single one."

The monthly payment required that each month the Houston Oil Company tender to Pratt and his heirs their alleged royalty payment and their acceptance of it. Any month either party could have refused its or their part of the cooperation necessary to continuance of the unlawful taking of petitioner's et al's property.

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorney in brief or otherwise. Nor has any court mentioned the issue or determined it.

The United States District Court, in the Federal case, *Reed* v. *Houston Oil Company et al*, found "There is no evidence of fraud before the Court . . .

. . . in the securing of the contract of September 28, 1925. (Fed. Tr. R. 519) The Circuit Court of Appeals affirmed the decision of the District Court and said "There was no fraud."

The findings of those two courts in no way dispute what has just been said—that Pratt had disqualified himself from negotiating the September 28, 1925 contract by having secret financial dealings with the Houston Oil Company, which are undisputed, thereby placing his private interest in conflict with the duty he owed his corporation, whereby his right of representing his company ceased the moment the conflict arose.

It is the law in Texas and in all the states and under the federal decisions, that a fiduciary's right to represent his cestui que trust ceases the instant the conflict arises, whether or not attended by fraud. Justice Cardozi in *Wendt* v. *Fischer Supra*, (See page 73 in this brief).

In the case of *West* v. *Camden*, 135 U. S. 507, 10 S. Ct. 838, 34, L. Ed. 254, the agreement was one made personally by Camden, a director and stockholder of a corporation, that West should be permanently retained as vice-president of that company at a salary of $5,000 a year. It was not an agreement of the corporation itself. Inasmuch as its breach might readily be presumed to result in the personal liability of Camden for damages, the agreement was of a character to place defendant's personal interests in possible conflict with the best interests of

the corporation and its stockholders, and, as plaintiff knowingly dealt with defendant with respect to the subject matter touching his fiduciary relationship to the stockholders, the contract was manifestly void, *not because a fraud was perpetrated or contemplated, but because the contract was against public policy, even though there would not have been any direct gain to the promisor,* the defendant.

Following is the syllabus in the foregoing case.

> "An agreement by a director of a corporation to keep another person permanently in place as an officer of the corporation is void as against public policy, even though there was not to be any direct private gain to the promisor—not because a fraud was perpetrated or contemplated, but because the contract placed the defendant under direct and very powerful inducement to disregard his duties to the members of his corporation." West v. Camden, 135 U. S. 507, 10 S. Ct. 838, 34 L. E. 254.

In the case of *Nabours* v. *McCord,* 80 S. W. 595, the Supreme Court of Texas said:

> "No man can in this court, as an agent, be allowed to put himself into a position in which his interest and his duty will conflict." p. 600.

> "The court will not inquire, and is not in a position to ascertain, whether the bank had lost or not lost by the act of the directors." p. 600.

The Supreme Court of Texas in the same case

gives the reason why the law must be such in a relationship between a fiduciary and his beneficiary when that Court said:

> "The rule is founded on the danger of imposition and the presumption of the existence of fraud inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, and which, in the cases in which such relationship exists, is deemed to be itself sufficient to create the disqualification." Nabours v. McCord, 80 S. W. 595, 598, 599 (Tex. Sup. Ct.)

FIFTH ISSUE

This being a stockholders' action, it could not be taken up in vacation time and be "dismissed with prejudice" without notice first being given to petitioner and the rest of the 400 stockholders and the corporation.

No such notice was ever given, as is evidenced by the judgment record. (Tr. R. 32 to 37) Therefore the alleged judgment of January 26, 1937, is void on the face of the record.

> "Judges of the district courts may in vacation, *by consent of the parties*, exercise all powers, make all orders, and perform all acts as fully as in term time, and may, by *consent of the parties*, try any civil case, except divorce cases, without jury and enter final judgment, etc." Art. 1915, Vernon's Tex. Stat. 1928.

This was repealed two years ago. Any judgment

entered dismissing case with prejudice, before the statute was repealed, without consent of all parties, particularly the plaintiffs, and when the action is brought in behalf of a corporation without notice first being sent to the plaintiff who appeared by attorney, and also to all the 400 other stockholders, is void. *Walker, et al* v. *Meyers, et al*, 266 S. W. 499 (Sup. Ct. of Texas)

No notice was sent to petitioner nor to his attorney nor to any of the 400 stockholders in Wisconsin that the case was to be taken up in vacation time and dismissed with prejudice. Petitioner, a doctor who lives in Milwaukee, Wisconsin, testified in the federal case that he had no notice that the case was to be taken up and dismissed with prejudice and knew nothing about it until 18 months thereafter. (Fed. Tr. R. 804)

As the face of the judgment record shows, (Tr. of R. 32 to 37) no procedure of any kind was followed or attempted to be followed by which the rights of the absent stockholders could have been protected. Thus the judgment is void at least as to petitioner and the 400 stockholders who did not appear by attorney when the case was dismissed with prejudice. *Hansberry* v. *Lee*, 311 U. S. 32, 61 S. Ct. 115.

The absentee shareholders and petitioner, as plaintiffs, had the vested right to prosecute the case to judgment when W. E. Hewit refused to do so. That is a property right which cannot be cut off without

a procedure which meets the requirements of the due process clause of the 14th Amendment of the Constitution of the United States. *Hansberry* v. *Lee* (Supra) The record shows indisputably that no procedure of any kind was followed.

What transpired on January 26, 1937, when the case was attempted to be dismissed, is all to be found on two or three pages of the record. See (Tr. R. 32 to 37)

This issue, although presented to the courts, federal and state, has never been discussed by defendants' attorneys in brief or otherwise. Nor has any court mentioned the issue or determined it.

THE SIXTH ISSUE

Thomas H. Pratt being one of the defendants, neither he nor his private attorney could appear in this case for the Pratt-Hewit Corp because of the direct conflict between his private interest and the interest of his corporation.

By reason of the fact that Pratt was a defendant both were disqualified from answering for the Pratt-Hewit Corp or to give its consent to the taking up of the case during vacation time and were also disqualified from consenting to the entering of a judgment "dismissing case with prejudice." The necessary result of this was to take the corporation's and the stockholders' property without the due process of law guaranteed to them by the 14th Amendment of the Constitution of the United States.

The undisputed record shows that in this case Pratt, who was a defendant, and his private attorney, J. V. Vandenburg Jr., answered for the Pratt-Hewit Corp which, although named as a defendant in fact, was the true plaintiff. (Tr. R. 36) (Error in copying name of attorney from the original answer where he signed as J. V. Vandenberge Jr.) Pratt, under oath, verified the petition of the Pratt-Hewit Corp.

Pratt, as a defendant, filed his personal answer which he verified under oath and which also was signed by his private attorney, J. V. Vandenberge. (Tr. of R. 36)

The Honorable J. P. Pool had previously disqualified himself from trying the case, as is shown in the judgment record. (Tr. R. 32)

Stipulations were put on record by attorneys representing W. E. Hewit, plaintiff, and five intervening stockholders, but none representing intervenor, F. F. Dollert, nor any of the other 400 stockholders. These stipulations were also signed by defendants' attorneys. By these stipulations it was attempted to do three things.

(a) That the Hon. J. P. Pool withdrew his statement that he was disqualified from trying the case.

(b) Consent to the taking up of the case in vacation time.

(c) Enter a judgment dismissing the case with prejudice. (Tr. R. 32-37)

The record shows that Thomas H. Pratt, a defendant, and his private attorney, J. V. Vandenberge Jr., unlawfully attempted to represent the Pratt-Hewit Corp, the true plaintiff.

From this it follows that the Pratt-Hewit Corp was not represented by anyone who had authority to appear for it. The judgment on the face of the record of the proceedings had on January 26, 1937, as to the Pratt-Hewit Corp, petitioner, and the 400 stockholders who had not intervened in the case, therefore, is void, on the face of the record.

This issue, although presented to the state courts, has never been discussed by defendants' attorneys in briefs. Nor have the state courts mentioned or determined the issue.

The Alleged Judgment of the District Court, Affirmed by the Court of Civil Appeals, is Obviously Indefinite, Alternative, and Conditional, in fact, is No Judgment at all.

The judgment of the District Court "that said motions be, and they are hereby, dismissed for lack of jurisdiction; and further, that if the Court have jurisdiction over said motions, they are hereby overruled for lack of merit." (Tr. R. 29) is no judgment at all.

The foregoing is an alternative conditional judgment. It does not definitely decide that the Court had jurisdiction. Then again it does not definitely decide that the motions are without merit because it does not know whether it has or does not have jurisdiction. A valid judgment must have finality, at least as to some issue, something which this judgment does not possess. "A judgment must be definitive." 33 C. J. 1102.

"'It is the general rule that judgment must not be conditioned upon any contingency and it has been held that an *alternative* or *conditional* judgment is wholly void.' 33 C. J. 1196, Sect. 1299. 'As a general rule, judgment cannot be in the alternative for one thing or another, but must specifically determine the rights of the parties in a definite manner. 33 C. J. 1197, Sect. 130; *Gathings* v. *Robertson* (Tex. Civ. App.) 276 S. W. 218, *Miller* v *Farmer's State Bank & Trust Co.* (Tex. Civ. App.) 241 S. W. 540; *Ft. Worth Acid Works* v. *City of Ft. Worth* (Tex. Civ. App.) 248 S. W. 822." *Patton* v. *Mitchell* (Tex. Civ. App.) 13 S. W. 2d, 146

Battel v *Lowery*, 46 Iowa 49, 52.

The Court in this case found a garnishee to be liable for one of two amounts to be determined by a future contingency and decreed that plaintiff should recover against the garnishee one or the other of such amounts, according to the event of such contingency. This was held not to constitute a judgment. The Court said:

> "If the finding is alternative, conditional or contingent, the judgment necessarily partakes of the same character. Such a judgment would be an anomaly and serve no useful purpose."

Although the decision of the District Court of Refugio County is not a final judgment, in fact, is no judgment at all, nevertheless, the Court's pronouncement and the procedure followed by the District Court and the Court of Civil Appeals necessarily deprived petitioner, the stockholders, and the corporation of their property without a judicial determination upon which alone such deprivation could be justified, in violation of the Due Process clause of the 14th Amendment and also resulted in denying the petitioner and the stockholders the privileges and immunities to which they were entitled as citizens of the United States.

The Failure of the District Court and the Court of Civil Appeals to Determine whether or not They had Jurisdiction after Their Jurisdiction had been Definitely Challenged, Denied Petitioner et al the Due Process of Law and the Privileges and Immunities as Guaranteed to United States Citizens by the 14th Amendment.

The District Court is the court of general jurisdiction of Texas. It was therefore in duty bound to pass definitely upon the question of whether it did or did not have jurisdiction to pass upon petitioner's motion and not leave that jurisdictional question undecided and hanging in the air where it still is. Its failure to do so and likewise the failure of the

Civil Court of Appeals to do its duty by passing upon the question of whether it had jurisdiction when challeneged by petitioner, resulted in denying petitioner and the stockholders the due process of law and the privileges and immunities to which they are entitled as citizens of the United States, guaranteed to them by the 14th Amendment, all of which deprived them of their property without a judicial determination by which alone such deprivation could be justified.

Galley v. *Hedrick* (Tex. Civ. App.) 127 S. W. 2d 978, 980.

"It has long been the established law of this state that in adjudicating questions of jurisdiction, courts are not bound by allegations of the plaintiff's petition. The rule is that, in the trial of a case, if at any time during its progress it becomes apparent that the Court has no authority under the law to adjudicate the issues presented, it becomes the duty of the Court to dismiss it. Under our system of jurisdiction the rule could not be otherwise because the judgment rendered by a court in a controversy over which the Court does not have jurisdiction is a nullity. If, therefore, after it appears to the Court at some stage of the proceeding that he does not have jurisdiction of the subject matter, he should nevertheless proceed to final judgment, it is obvious the time and effort would be squandered and no purpose whatever would be served. *Able* v. *Bloomsfield*, 6 Tex. 263; *Snyder* v. *Wiley et al*, 59 Tex. 448; *Watson* v. *Baker*, 67 Tex. 48, 2 S. W. 375; *Treaccar*

v. *City of Galveston* (Tex. Civ. App.) 28 S. W. 2d 887."

The Second Part of the Court's Alleged Judgment "that if the Court had Jurisdiction over said Motions, they are hereby Overruled for Lack of Merit, Evidences an Attempt by the Court to Pass upon Facts Not Before It, Resulting in the Taking of Petitioner et al's Property Without the Due Process of Law.

The motions charging (a) that Pratt was disqualified from negotiating the September 28, 1925 contract for his corporation, (b) that the case was taken up during vacation time and dismissed with prejudice without giving any notice thereof to petitioner and his attorney and without giving notice to any of the 400 stockholders and (c) that the Pratt-Hewit Oil Corp, the true plaintiff, was not present through a duly authorized representative when the case was dismissed with prejudice in vacation time because Pratt, who was one of the defendants, and his private attorney, who attempted to represent said corporation, were disqualified from so doing, *present issues of fact.* These facts are all set out in petitioner's proposed amended original petition, (Par. XII, Tr. R. 36) the filing of which was denied by the District Court. The record shows that no testimony was offered or taken on October 8, 1943 when the motions were up for a hearing. (Tr. R. 29 to 37) The record thus shows on its face that petitioner et al were denied the right of having a hearing on those issues of fact as guaranteed to them by the Due Process Clause of the 14th Amendment.

The necessary result of such procedure was to deprive petitioner et al of their property without a judicial determination upon which alone such deprivation could be justified.

Then again it may be asked, did the District Court, by its language mean that the facts stated and alleged in petitioner's proposed amended original petition, particularly the facts relating to Pratt's secret financial dealings with the Houston Oil Company as related in detail in said proposed pleading of petitioner, do not state a cause of action. If so, then it follows that the Court was bound by the rule pertaining to demurrer or motion to dismiss, that all facts well pleaded are assumed to be true. But these facts on their face wholly fail to sustain in any way the Court's alleged finding that the motions "lack merit." As the facts appear on the record, that is, on its face, this Court is not bound by such alleged finding, but must hold as the facts plainly speak, namely, that Pratt was undertaking the impossible and what is inexorably forbidden by all courts, of attempting to serve dual conflicting interests. The truth is that it is impossible to know exactly what the District Court did mean by that finding, except that it tried to write something into the judgment which would be a catch-all.

The necessary result arising from the alleged judgment and procedure of said District Court and the affirmance of the same by the Court of Civil Appeals is (a) that petitioner and the stockholders of the Pratt-Hewit Corp are deprived of their valuable

oil properties without a judicial determination upon which alone such deprivation could be justified, all in violation of the Due Process Clause of the 14th Amendment, and (b) petitioner and stockholders are denied "the privileges and immunities" to which they are entitled as citizens of the United States by virtue of said amendment.

In order that a judgment be on the merits "there must have been either a hearing of some kind or an opportunity for a hearing, at which the merits could have been presented." 26 Tex. Jur. 86, Sect. 388, cases cited. *Southern Nat. Co.* v. *Beck & Bridges* (Civ. App.) 55 S. W. (2d) 215; *Miller* v. *Link Lumber Co* v. *Stephenson* (Civ. App.) 265 S. W. 215, affirmed (Com. App.) 277 S. W. 1039, *Hartford Fire Ins Co.* v. *King*, 31 Civ. App. 636, 73 S. W. 71.

APPLICABLE FUNDAMENTAL PRINCIPLES OF LAW

The expression "face of the record" includes the entire record in the case and is not to recitals in the judgment itself.

"The expression 'face of the record' in proceedings of this kind attacking judgments, includes the entire record in the case, and is not limited to what the judgment recites itself." *Carson* v. *Taylor*, 261 S. W. 824 (Tex. Civ. App.) *State Mortgage Corp.* v. *Ludwig* (Sup. Ct.) 48 S. W. 2d 950.

One void consideration makes the entire contract void.

"We think the effect of the above authorities is to hold that a contract based upon more than one consideration, any one of which is unlawful, whether violative of statutes or the common law, is not divisible so that one of its provisions may be enforced, but the contract as a whole is unenforceable and void." *Hendricks* v. *Wall*, 277 S. W. 207, 210 (Tex. Civ. App.) *Reed* v. *Brewer*, 90 Tex. 144, 37 S. W. 418.

Lapse of time and old age cannot give force to a void judgment. The Supreme Court of Texas annulled a judgment void on the face of its record 40 years after it was entered.

"A void judgment cannot bind anyone, and it is well settled it may be collaterally attacked. Lapse of time cannot aid it or give it any force as a judgment. These administrations being nullities, the heirs of Byrne forfeited no right to set aside, or delay in suing for the land." *Paul, et al* v. *Willis, et al*, 69 Tex. 261, 7 S. W. 357. This case was decided November 8, 1887.

Facts as stated in the Syllabus of the above case:

"A person died in 1836, intestate, leaving as his only property some real estate. Administration was granted in 1846, upon application which did not show jurisdiction, and seven years later administration de bonis non was granted upon application failing to show special reason therefore, and a debt allowed, to satisfy which said real estate was sold. HELD that both administrations were void, and

that the order of sale, being void, may be attacked collaterally."

Judgment in this case was vacated because void, even though forty years had elapsed since it was entered.

"An illegal contract is not subject to ratification.

"If this contract is illegal and against public policy, there is no power which can breathe life or validity into it, and the ratification attempted to be made by the city commission would be void." *Meyers* v. *Walker* (Tex. Civ. App.) 275 S. W. 305, 307.

Res judicata has no application when judgment is void.

"The rule of res judicata has no application where the Court rendering the judgment pleaded in bar did not have jurisdiction of the subject matter or the parties to the action. *Wolfe County* v. *Tolson*, 140 S. W. 2d, 671, 672, 283 Ky. 11." Words & Phrases Per. Ed. Vol. 37 1943 Supp. p. 163.

The Court of Civil Appeals by Its Failure to Pass Upon Petitioner's Jurisdictional Issues "Begged the Questions", that is Assumed without Proof that the September 28, 1925 Contract and the Judgment Entered thereon were Both Valid which in Effect Gave Petitioner et al's Property to the Houston Oil Co. without Any Judicial Determination, in violation of the 14th Amendment.

The opinion of the Court of Civil Appeals (Tr. R. 39 to 42) is to the effect that petitioner's motion charging that the September 28, 1925 contract is

void and the judgment entered thereon is necessarily also void, is (a) a motion for a new trial and therefore comes too late, (b) that it fails to meet the requirements of the bill of review, (c) that the judgments of the State District Court, the United States District Court, and the Circuit Court of Appeals are res judicata, although not one of the reasons and issues presented by petitioner's motion has ever been passed upon or even mentioned by either one of the foregoing courts.

A motion for a new trial, a bill of review, and the affirmative defense of res judicata pleading a former judgment, each one assumes that the court had jurisdiction of the subject matter involving litigation. Petitioner takes issue in his motion with the unjustifiable assumption of the Court of Civil Appeals, as evidenced in its opinion, namely, that the September 28, 1925 contract and the judgment entered thereon are both valid and not void and therefore the State and Federal District Courts, the Circuit Court of Appeals, and the Court of Civil Appeals itself have jurisdiction over the subject matter. Petitioner, in his motion, directly takes issue with the assumption and says that the September 28, 1925 contract and the judgment on the face of the record are void. The Court of Civil Appeals, threfore, begs the question as to each one of the issues presented by petitioner's motion, by its proceeding upon such an indefensible assumption. Thereby said court has failed to perform the duty devolving upon it of determining the issues presented to it.

Neither in the State nor Federal District Court, the Circuit Court of Appeals, nor in the Court of Civil Appeals has any one of the issues presented by petitioner been determined or even so much as mentioned. The effect of this unwarranted procedure of the Court of Civil Appeals in refusing to determine any one or all of said issues has been to deprive petitioner and the stockholders and the Pratt-Hewit Corp of their property without any judicial determination of the issues presented to the Court by petitioner on his motion, upon which alone such deprivation could be justified, in direct violation of the Due Process Clause and the Privileges and Immunities Clause of the 14th Amendment of the United States Constitution.

CONCLUSION

Petitioner charges that the September 28, 1925 alleged contract, whose cancellation is the one subject in this litigation, is void and not voidable. From that it follows:

(a) that any judgment pretended to be entered thereon necessarily is also void on the face of the record;

(b) the District Court of Refugio County never acquired jurisdiction of the property described in said alleged contract;

(c) the decision of the District Court overruling petitioner's motion to set aside the judgment is void. Likewise, the affirmance of the District Court judgment by the Court of Civil

Appeals and the attempt of the Supreme Court, by its alleged denial of petitioner's application for writ of error, thereby holding that the Court of Civil Appeals committed no error, is void;

(d) that the United States District Court of the Southern District at Houston never acquired jurisdiction over the property described in the alleged September 28, 1925 contract, the cancellation of which alleged contract also being the basis of that case. From that it follows that the judgment of the Circuit Court of Appeals, in its attempt to affirm the judgment of the District Court, is also void.

Thus the issues of petitioner are jurisdictional, which made it the duty of each court to have passed on those questions before it proceeded any further.

The result which necessarily followed from these courts not doing their duty presents a federal question of much substance because the inevitable result arising from such failure of duty has been the depriving petitioner, the stockholders and the corporation of their valuable oil properties situated in Texas and giving them to the Houston Oil Company without any judicial determination of the charges of petitioner, upon which determination alone such deprivation could be justified, as required by the Due Process Clause of the 14th Amendment.

Unless this court grants this petition for certiorari and hears and determines each one of these issues, the petitioner, in behalf of his corporation and the other stockholders, is denied that course of legal

proceedings that is in accordance with the law of the land or as expressed by the Due Process of Law clause of the 14th Amendment. In other words, the doors of justice will then have been completely closed to their pleas.

WHEREFORE, petitioner prays that his application for writ of certiorari be granted.

Respectfully submitted

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(54)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 864

F. F. DOLLERT, ET AL., *Petitioners,*

v.

PRATT-HEWIT OIL CORPORATION AND HOUSTON OIL COMPANY OF TEXAS, ET AL., *Respondents*

REPLY OF RESPONDENT, HOUSTON OIL COMPANY OF TEXAS,

To the Petition for Writ of Certiorari to the San Antonio Court of Civil Appeals of the State of Texas, and Brief in Support Thereof

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Counsel for Respondent

Of Counsel:
BLADES, CHILES, MOORE, KENNERLY & KNIGHT

ALPHA LAW BRIEF CO., HOUSTON

SUBJECT INDEX

LIST OF AUTHORITIES

CASES

REVISED CIVIL STATUTES OF TEXAS (1925)

TEXAS RULES OF CIVIL PROCEDURE

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To the Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Respondent, Houston Oil Company of Texas, respectfully contends and submits that the Writ of Certiorari herein prayed for, wherein Petitioner seeks to have this Honorable Court review and reverse a decision of the Court of Civil Appeals, San Antonio, Texas, on the alleged ground that such decision denied to Petitioner (a) "due process of law" and (b) "the privileges and immunities" guaranteed by the 14th

Amendment of the CONSTITUTION OF THE UNITED STATES, should not be granted under the following facts, for the following reasons:

Summary Statement of Matters Involved

References hereinafter made are to Federal Transcript of Record (F.T.R.) filed in suit of Wert T. Reed, et al., v. Houston Oil Company of Texas, et al., No. 10,199, United States Fifth Circuit Court of Appeals, 132 Fed. (2d) 748, and filed in connection with Application for Writ of Certiorari, No. 877, October Term, 1942, in same suit in United States Supreme Court, 319 U.S. 743, 87 L. Ed. 1699, and to State Transcript of Record (S.T.R.), filed in connection with Application for Writ of Certiorari, No. 864, October Term, 1944, in suit of F. F. Dollert, et al., v. Pratt-Hewit Oil Corporation, et al., in United States Supreme Court.

Petitioner herein seeks to have this Honorable Court review and reverse a decision of the Court of Civil Appeals, San Antonio, Texas, rendered March 8, 1944, in the case of F. F. Dollert v. Pratt-Hewit Oil Corporation, et al. (179 S.W. (2d) 346), in which the Supreme Court of Texas, on May 31, 1944, entered an order determining that the judgment of the Court of Civil Appeals was correct and that the Petitioner's Application for Writ of Error should be refused for want of merit (S.T.R. pp. 39 and 48). The Court of Civil Appeals, by its decision, affirmed the judgment of the District Court of Refugio County, Texas, which was entered October 18, 1943, and which overruled F. F. Dollert's Motion filed August 5, 1943, to set aside an Order of Dismissal with prejudice entered at the request and agreement of all parties on January 26, 1937. Petitioner contended in his Motion, being a Motion for New Trial, that the judgment of dismissal was void on its face and that the contract of Septem-

ber 28, 1925, which plaintiff sought to set aside in the suit filed on September 28, 1927, was fraudulent and illegal. On the hearing of the Motion there was introduced no evidence of fraud or illegality in the contract. The Trial Court held that the judgment of dismissal was valid on its face and that the court was not really concerned about the contract itself but only about the previous order of dismissal and dismissed such Motion to set aside judgment and for New Trial for lack of jurisdiction, more than six years having elapsed between the previous Order of Dismissal and the Motion for New Trial, and in the alternative overruled it on its merits.

Three years after the dismissal in 1937 of the stockholders' suit in the State Court, a similar suit in which F. F. Dollert was intervener was filed in 1940 in Federal Court. In that suit Houston Oil Company of Texas and other defendants pleaded, among other defenses, the judgment of dismissal with prejudice as res judicata. F. F. Dollert, in the Federal suit, contended that such judgment was void on its face and therefore not res judicata, and that the contract which he sought to set aside was fraudulent and illegal. The Federal District Court after trial held that there was no evidence of fraud or illegality and that the Order of Dismissal with prejudice was not void and that the plea of res judicata should be sustained (F.T.R. 507 to 520). From this decision F. F. Dollert appealed to the United States Circuit Court of Appeals, Fifth Circuit, and on January 8, 1943, that court affirmed the Trial Court's judgment. (WERT T. REED AND F. F. DOLLERT v. HOUSTON OIL COMPANY OF TEXAS, ET AL., 132 Fed. (2d) 478.)

On May 3, 1943, the United States Supreme Court in WERT T. REED AND F. F. DOLLERT v. HOUSTON OIL COMPANY OF TEXAS, ET AL., denied F. F. Dollert's Petition for

Writ of Certiorari, No. 877, October Term, 1942 (87 L. Ed. 1699, 319 U.S. 743).

We believe that a simple chonological statement of the facts and procedure involved in these cases will be of aid and assistance to the Court in passing upon Petitioner's Petition for Writ of Certiorari and at the same time will be a complete answer and defense thereto and the best argument for denying said Petition.

(1) SEPTEMBER 28, 1925, an oil and gas joint operating contract was entered into by and between Pratt-Hewit Oil Corporation and Houston Oil Company of Texas (F.T.R. p. 889) (S.T.R. p. 22).

(2) SEPTEMBER 28, 1927, the suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., No. 795, District Court of Refugio County, Texas, was filed as a class or stockholders' suit by a stockholder of Pratt-Hewit, later joined by F. F. Dollert, now Petitioner, and other stockholders as intervenors, for the purpose of setting aside such contract for alleged fraud and alleged illegality. Arthur H. Bartelt, the attorney for the present Petitioner, represented some of the intervenors (F.T.R. pp. 174 and 186).

(3) SEPTEMBER 12, 1933, there was filed Consolidated Cause No. 1154, styled A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company of Texas, et al., District Court, Refugio County, Texas. F. F. Dollert, present Petitioner, was a defendant in that case and was represented by Arthur H. Bartelt, his present attorney. That case involved incidentally the validity of the Joint Operating Contract (F.T.R. p. 175).

(4) JANUARY 26, 1937, a final judgment was entered in the suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., No. 795, District Court, Refugio County, Texas,

upon the Motion of Arthur H. Bartelt and other attorneys in which judgment it was provided that such cause of action was dismissed with prejudice and from which judgment no appeal of any kind was ever perfected (F.T.R. pp. 223-228).

(5) APRIL 11, 1938, a final judgment was entered in the above suit of A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company of Texas, et al., approved by Arthur H. Bartelt, attorney for F. F. Dollert, and based on a settlement agreement approved by such attorney recognizing the validity of the Joint Operating Contract (F.T.R. p. 177).

(6) FEBRUARY 12, 1940, Arthur H. Bartelt, on behalf of Wert T. Reed, a stockholder of Pratt-Hewit, filed a suit in the United States District Court, Southern District of Texas, Victoria Division, styled Wert T. Reed v. Houston Oil Company of Texas, et al., No. 17, which was afterwards transferred to the Houston Division and given Number 422 in said division. This was a stockholders' and class suit involving the same Joint Operating Contract of September 28, 1925, and was practically identical to the above State Court suit filed September 28, 1927, styled W. E. Hewit v. Pratt-Hewit Oil Corporation, et al., and which had been dismissed *with* prejudice on January 27, 1936, on the motion of Arthur H. Bartelt and the other attorneys in such case (F.T.R. p. 310).

(7) AUGUST 20, 1940, Arthur H. Bartelt wrote a letter to the District Judge of Refugio County, Texas, and requested permission to withdraw certain papers in the State Court suit of W. E. Hewit, et al., v. Pratt-Hewit Oil Corporation, et al., which letter, among other things, stated:

"This case was dismissed by the Court with prejudice

January 28, 1937, upon request of all parties." (Amicus Curiae Exhibit 16) (S.T.R. p. 31).

(8) OCTOBER 26, 1940, F. F. Dollert filed in the Federal Court suit a petition for leave to intervene and he, through his attorney, Arthur H. Bartelt, alleged "whatever judgment is entered in this case this petitioner will be bound by" (F.T.R. p. 468).

(9) DECEMBER 4, 1940, F. F. Dollert, through his attorney, Arthur H. Bartelt, filed his intervention in said Federal Court suit and adopted the pleadings of the plaintiff, alleging that the Joint Operating Contract was fraudulent and illegal, and further that the Federal Court suit was not identical with the State Court suit which had already been finally disposed of by an order of dismissal with prejudice, and still further that such dismissal had been obtained by fraud in that Houston Oil Company of Texas had filed an answer which contained a General Denial and thereby "deliberately pleaded a falsehood when it denied 'each, all, and every one of the allegations in plaintiff's petition contained, says same are not true in whole or in part and of this it puts itself upon the country' " (F.T.R. p. 468).

(10) FEBRUARY 24, 1941, the Federal Court suit went to trial and F. F. Dollert was represented by Arthur H. Bartelt and such trial resulted in a judgment against F. F. Dollert (F.T.R. p. 504).

(11) MARCH 11, 1941, the Court entered a final judgment in the Federal Court suit which among other things recited, "Court is of the opinion that judgment should be entered against the intervener and in favor of the defendants on the merits; it is therefore Ordered, Adjudged and Decreed that Intervener, F. F. Dollert, take and recover

nothing of and from the defendants or either of them" (F. T.R. p. 504).

(12) APRIL 11, 1941, the Court in the Federal Court suit filed Findings of Fact and Conclusions of Law (F.T.R. pp. 507-520). Among other things the court found and held:

(a) "This contract was to the advantage of both the Pratt-Hewit Oil Corporation and the defendant, Houston Oil Company of Texas."

(b) "W. E. Hewit, for himself and all other stockholders, brought a suit in the District Court of Refugio County, Texas, in which he sought substantially the same relief that is sought in this case."

(c) "No evidence of fraud in procuring the dismissal of that lawsuit with prejudice has been brought before this Court. So far as the right of the intervener Dollert and the rights of the defendant Houston Oil Company of Texas and the Pratt-Hewit Oil Corporation are concerned, there was an absolute identity of parties and subject matter. The only distinction is that in the suit brought in the State District Court of Refugio County no specific evidences of fraud were pointed out in the petition in that case as have been attempted to be pointed out in the complaint in this case, but the charges of fraud and the charges of the purchase of the discretion of Thomas H. Pratt are, from a legal standpoint, the same. The charges that the contract is illegal and unjust and unlawful are the same."

(d) "There is no evidence of fraud, no credible evidence of fraud, before me on the part of either Thomas H. Pratt or W. E. Hewit."

(e) "Since the intervener, F. F. Dollert, was a party to the (State Court) suit involving the identical issue of fraud in procuring the contract of September 28, 1925, he is bound by the judgment of dismissal with prejudice entered in that cause in 1937 and cannot re-

cover here, and the defendants' plea of res adjudicata heretofore filed will at this time be sustained."

(f) "The Court is of the opinion that judgment should be entered against the intervener and in favor of the defendants on the merits."

(g) "Since both the plaintiff and the intervener knew of the pendency of the suit in the State District Court of Refugio County and knew of the general charges made in the various letters to the stockholders to the effect that the contract of September 28, 1925, was in fraud of the rights of the stockholders of the corporation, and since Dollert, the intervener, was a party to that suit, and since both intervener and plaintiff could have known, or could have learned of the existence of the very evidence now relied on by them to show fraud, they have been guilty of laches and of such delay in the bringing of this suit that they are not entitled to maintain it now."

(h) "The defendants, Pratt-Hewit Oil Corporation of Delaware and Texas, the Houston Oil Company of Texas, the Houston Pipe Line Company, Grace D. Pratt, and Christie Hewit are entitled to judgment that plaintiff and intervener take nothing by this suit."

(i) "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil Corporation), one of which was a shareholders' suit" (F.T.R. pp. 507-520).

(13) JANUARY 8, 1943, the United States Circuit Court of Appeals, Fifth Circuit, affirmed the decision of the trial court in the case of WERT T. REED v. HOUSTON OIL COMPANY OF TEXAS, ET AL., and among other things held:

"It is claimed by Appellants (Wert T. Reed and F. F. Dollert) that the contract and leases were procured by fraud, part of which consisted in bribing a corporate

officer. Many issues were presented and many defenses raised in the court below, but Appellees' real defense was that there was no fraud. No good could result either from restating the pleadings or reviewing the evidence in this case. The findings and conclusions of the District Court are free from error and the judgment appealed from is affirmed" (132 Fed. (2d) 748).

(14) MAY 3, 1943, the United States Supreme Court denied F. F. Dollert's petition for Writ of Certiorari, 87 L. Ed. 1699, 319 U.S. 743.

(15) JUNE 1, 1943, the United States Supreme Court overruled F. F. Dollert's Motion for Rehearing, 87 L. Ed. 1699.

(16) AUGUST 5, 1943, Houston Oil Company of Texas received from Arthur H. Bartelt, through the mail what purported to be a copy of Motion to set aside the State Court judgment entered January 26, 1937 (S.T.R. p. 1).

(17) OCTOBER 14, 1943, Suggestions by Amicus Curiae were filed in the District Court of Refugio County, Texas, calling Petitioner's attention to the fact that the Court was without jurisdiction on such motion and that if he were entitled to set aside such judgment of dismissal his remedy was by a separate suit of bill of review (S.T.R. p. 27 and 28).

(18) OCTOBER 18, 1943, the District Court of Refugio County, Texas, in a hearing on the Motion of F. F. Dollert to set aside the State Court judgment of January 26, 1937, entered an order reading in part as follows:

"that said motions be and they are hereby dismissed for lack of jurisdiction, and further, that if the court have jurisdiction over said motions, they are hereby denied and overruled for lack of merit" (S.T.R. p. 28).

(19) FEBRUARY 16, 1944, Petitioner's attorney in his oral

argument in the Court of Civil Appeals, San Antonio, Texas, stated that he did not file a bill of review because such action was barred by the lapse of time. He sought to get around the long lapse of time by trying to stay in the same suit and get relief therein by a new trial. The Court of Civil Appeals in its opinion stated:

> "Appellant's counsel upon oral argument of this appeal maintained that said motion was not intended as and for a bill of review. Counsel stated quite frankly that relief by way of bill of review was barred by lapse of time—the order of dismissal with prejudice having been rendered on January 26, 1937, while the motion here involved was filed on August 5, 1943" (S.T.R. p. 39, 179 S.W. (2d) 346).

(20) MARCH 8, 1944, the Court of Civil Appeals affirmed the judgment of the trial court (S.T.R. p. 39 and 179 S.W. (2d) 346).

(21) APRIL 5, 1944, the Court of Civil Appeals overruled Motion for Rehearing (S.T.R. p. 44).

(22) MAY 31, 1944, Supreme Court of Texas refused Application of F. F. Dollert for Writ of Error and in its order recited: " * * * the Court having determined that the judgment of the Court of Civil Appeals is correct, it is ordered that the application be refused for want of merit" (S.T.R. p. 48).

(23) SEPTEMBER 27, 1944, the Supreme Court of Texas overruled Motion for Rehearing (S.T.R. p. 48).

(24) JANUARY (?), 1945, Petitioner filed Petition for Writ of Certiorari with Clerk, United States Supreme Court.

REASONS WRIT OF CERTIORARI SHOULD NOT BE GRANTED

First

Because the decision of the State Court did not violate that provision of the Fourteenth Amendment of the United States Constitution reading: "No State shall make or enforce any law which shall abridge the 'privileges or immunities' of citizens of the United States," since the State had made no law and the Court enforced no law of the State which was an abridgment of privileges or immunities of citizens.

Second

Because the decision of the State Court did not violate that provision of the Fourteenth Amendment of the United States Constitution reading: "nor shall any State deprive any person of life, liberty or *property* without *due process of law*," since Petitioner's cause of action, the right to set aside a contract for alleged fraud and illegality, being a property right, had been dismissed with prejudice by agreement of all parties more than six years previously in a State Court and said identical cause of action had been adjudicated adversely to Petitioner more than three years previously in a Federal Court, and since the action of the Court of Civil Appeals merely affirmed an order of the trial court dismissing for want of jurisdiction a motion to set aside a judgment or motion for new trial untimely filed and more than six years too late, when Petitioner might have filed a timely motion and perfected an appeal or filed within four years, for good cause shown, a bill of review, showing a meritorious cause of action, under the State Court procedure.

Brief in Support of Reply

Petitioner in his petition has pointed out no law made by the State of Texas or enforced by the State Court which abridged "privileges or immunities" belonging to him as a citizen of the United States. The reason for such omission is obvious. There was no such law involved in his case.

The decision of the State Appellate Court deprived him of no property or property rights. Before he filed his belated Motion for New Trial he had already lost his alleged cause of action in the Federal Courts. As shown hereinabove, the Federal Trial Court held that his cause of action in State Court was identical with his cause of action in the Federal Court. He was denied a recovery by the Federal Courts. REED AND DOLLERT v. HOUSTON OIL COMPANY AND PRATT-HEWIT OIL CORP., 132 Fed. (2d) 478, 319 U.S. 743, 87 L. Ed. 1699.

The decision of the State Appellate Court not only did not deprive Petitioner of property, but afforded him due process of law. The decision of the State Appellate Court simply affirmed an order of the State Trial Court which dismissed his Motion for New Trial for lack of jurisdiction. Petitioner, eighteen years ago, selected as his forum for trying his alleged cause of action, the District Court of Refugio County, Texas. He filed his intervention in a suit there and was charged with notice of the action and proceedings taken therein. In 1937, eight years ago, that suit was dismissed and as the order of the court recites "plaintiff, interveners, and defendants all requested the Court to dismiss this suit." While that suit was pending for ten years, Petitioner had ample opportunity to be heard and ample opportunity to defend his position. The proceedings in the State Court were orderly and were adapted to the nature of the case. He had not only his day in Court, but in fact his years. He has had fair and impartial trials. If he were dissatisfied with the dis-

missal he took no timely steps to appeal nor to file a bill of review as he might have done within four years from discovering a wrong, if any. More than three years after such dismissal he elected to file a similar intervention in a Federal Court suit. Such intervention was filed after it became apparent that the plaintiff could not maintain that suit because he was not a stockholder at the time of the alleged wrong and because his stock had not devolved upon him by operation of law. Petitioner contended that he was entitled to file such intervention in the Federal Court suit in the face of the dismissal with prejudice in the State Court suit because he claimed to have discovered new evidence of the fraud which he had originally alleged. The Federal Courts rendered judgment against him. He then sought to file a motion to set aside the order of dismissal entered in the State Court suit more than six years before. The proper procedure would have been to file a Bill of Review, but this would have required him to allege and prove just cause for delay and also a meritorious cause of action. It would be useless and folly to grant him a new trial if he had no meritorious cause of action. He had none because the Federal Courts had adjudicated that against him. As shown by the decision of the State Appellate Court, he did not take the route of Bill of Review because he knew that was then barred by limitation.

The State Courts had no jurisdiction over the belated Motion for New Trial other than to dismiss it for lack of jurisdiction. At the time the stockholders' suit was dismissed with prejudice by the District Court of Refugio County, Texas, on January 26, 1937, REVISED CIVIL STATUTES OF 1925, Art. 2232, read as follows:

> "New trials may be granted and judgments arrested or set aside on motion for good cause, on such terms as the court shall direct. Each such motion shall:
>
> "1. Be made within two days after the rendition of

verdict if the term of court shall continue so long, if not, then before the end of the term, and may be amended under leave of the court.

"2. Be in writing and signed by the party or his attorney.

"3. Specify each ground on which it is founded, and no ground not specified shall be considered.

"4. Be determined at the term of the court at which it is made."

At the time Petitioner filed his Motion to set aside said judgment of dismissal and motion for new trial on August 5, 1943, such statutory provision with reference to motions to set aside judgments and for a new trial had been carried into the RULES OF CIVIL PROCEDURE for the State of Texas as Rule 320, such rule being practically identical with the statutory provision. See GREEN v. GREEN, 288 S.W. 406 (T.C.A. 1926); WINTERS MUTUAL AID ASSN. v. REDDIN, 49 S.W. (2d) 1095 (T.C.A. 1932).

Petitioner has cited many cases, but they are not applicable to the situation at hand and need no comment.

Petitioner has complained much about the contract which he sought to set aside. The contents of the contract are really not material to this particular proceeding. They have been dealt with in other proceedings and adversely to Petitioner's contentions. Petitioner's contentions that the contract was void, fraudulent, illegal, and violative of the Texas Anti-trust, Monopoly and Usury laws have been overruled in the State Court and Federal Court proceedings, and such contentions were fully developed by Petitioner in his previous Petition for Writ of Certiorari, which was denied by the Supreme Court of the United States in REED AND DOLLERT v. HOUSTON OIL COMPANY AND PRATT-HEWIT OIL CORPORATION, 132 Fed. (2d) 478, 319 U.S. 743, 87 L. Ed. 1699.

Petitioner has confused his rights, or lack of rights, in the over due motion for new trial with rights he might originally have had in the case if his allegations had been true, and they were not, before it was dismissed with prejudice at the request of all parties and before the Federal Courts held that he should take and recover nothing on his alleged cause of action.

We therefore submit in the words of the Federal Trial Court in his findings: "There should be an end to litigation of this type, especially where there have been so many suits already involving this Company (Pratt-Hewit Oil Corporation), one of which was a shareholders' suit."

WHEREFORE, this Respondent respectfully prays that the Writ of Certiorari prayed for herein be in all things denied and refused.

Respectfully submitted,

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February 8, 1945, Houston, Texas

(25)

IN THE

Supreme Court of the United States

October Term 1944

No. 864

F. F. DOLLERT, ET AL,
Petitioners

v.

PRATT-HEWIT OIL CORPORATION, ET AL
Respondents

REPLY BRIEF OF PETITIONER, F. F. Dollert

To Reply of Respondent, Houston Oil Company of Texas

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REPLY BRIEF OF PETITIONER, F. F. Dollert

To Reply of Respondent, Houston Oil Company of Texas

Respondent in its reply several times interpolates the statement that petitioner's motion is merely "a motion for a new trial" and at other times calls it a bill of review. For example, on page 2 it is stated "petitioner contended in his Motion, being a Motion for a New Trial, that the judgment of dismissal was void on its face" etc., imputing that petitioner in-

tended his motion to be one for a new trial or a bill of review. Similar imputations are made on pages 14 and 15. Petitioner makes no such contention and says that it is neither a motion for a new trial nor a bill of review and cannot be, because such motions assume that the court had jurisdiction, which it did not have. The petitioner's motion to dismiss the action because the contract and the judgment are both void on their face means only one thing, that there never was a contract nor a judgment because the state district court never had jurisdiction of the subject matter or the parties except that it had the inherent power to strike from its records a case which never existed.

Through the entire reply there is a very much studied effort to draw the discussion away from a jurisdictional issue to one that is mere error in the trial of a case where the court had full jurisdiction of the parties and the subject matter.

The Houston Oil Company in this brief, as well as in every other brief it has filed, has never discussed the jurisdictional issue, namely, that the September 28, 1925 contract, the sole basis of this case, is void, and at no time could or did vest any interest in the Houston Oil Company, nor did the respondent at any time in its briefs, nor in this brief, discuss the several sub-issues, each one of which was sufficient to make the alleged contract and the pretended judgment of January 26, 1937, void.

The foregoing issues present jurisdictional ques-

tions. When they were presented to the Court it became the Court's duty to decide those issues before proceeding further. (See supporting brief, pp. 88-90). This, NONE OF THE COURTS DID. The Houston Oil Company has been in possession of the oil properties which are the subject of this litigation. The failure of the Courts to pass on these issues and thereby perform their duties as courts, that is, the trial court and the Court of Civil Appeals, necessarily has resulted, through such course of procedure, in the denial of the rights of the petitioner, his corporation and the other stockholders—a taking away and depriving them of their valuable oil properties WITHOUT ANY JUDICIAL DETERMINATION of the vital facts upon which alone such depredation could be justified. Thus, their said properties have been taken away from them AND GIVEN to the Houston Oil Company IN DIRECT VIOLATION of the due process clause of the Constitution of the United States.

Thus, at that point, namely, when the District Court of Refugio County and the Court of Civil Appeals REFUSED TO DETERMINE THE JURISDICTIONAL ISSUES presented by petitioner's motion the JURISDICTION OF THIS COURT WAS INVOKED.

Briefly stated, the following are the jurisdictional issues presented by petitioner:

1. The September 28, 1925 contract IS VOID because (a) it contains an unlawful dele-

gation of the managerial powers of the corporation to the directors of its competitor, the Houston Oil Company; (b) it violates the usury statutes of Texas; (c) it violates the anti-trust and monopoly statutes of Texas; (d) Thomas H. Pratt, the resident manager and official of the Pratt,-Hewit Corp., had forfeited his right to represent his corporation in the making of the alleged contract in having secret financial personal dealings with the Houston Oil Co. and its president in unusual large sums whereby Pratt put himself in a position where self-interest conflicted with the duty he owed his corporation.

2. The January 26, 1937 judgment is void because (a) the contract being void it follows, necessarily, that the judgment is void; (b) the judgment was dismissed with prejudice during VACATION TIME *without any notice* being given petitioner or any of the other stockholders, except the few who appeared at that hearing—through their attorneys—(this is a stockholder's action—each stockholder has a right to proceed with the case, of which right he could not be deprived without being given notice)—the Pratt-Hewit Corp. was not there and knew nothing about the hearing. Pratt and his private attorney J. V. Vandenburg, Jr., attempted to represent the Pratt-Hewit Corp. but, of course, could not because Pratt himself, was a defendant and the Pratt-Hewit Corp. was the true plaintiff because of conflict of Pratt's private interest with that of his corporation.

Even though neither state nor federal court has ever so much as mentioned the foregoing issues, respondent on page 14 of its reply says:

> "Petitioner's contentions that the contract was void, fraudulent, illegal, and violative of the Texas Anti-trust, Monopoly and Usury laws have been overruled in the State Court and Federal Court proceedings."

The phrase "have been overruled" definitely means that the Court has passed upon the issue by a written opinion and not by ignoring it.

Respondent in its reply, as in all its previous briefs, has never attempted to discuss the merits of these issues. It merely relates what the courts did in deciding against petitioner, which argument puts the "cart before the horse." It begs the issue. It assumes that which is in dispute, namely, the validity of the contract of September 28, 1925 and the judgment of January 26, 1937.

Petitioner's proposed amended petition and the facts therein contained are all a part of the motion. Here again in this reply the respondent does not dispute the facts charged against it, which are very serious in their nature, namely, that at the time of the making of the alleged contract, before and thereafter, Pratt was having secret financial dealings with the Houston Oil Co. and its president, all unbeknown to the stockholders of the Pratt-Hewit Corp., whereby the Houston Oil Co. and its president paid him a little more than $51,000 in cash and

secured for him an interest in a 200 acre oil lease for which Pratt PAID NOTHING and which became productive one-half month before the September 28, 1925 contract was made and has produced continuously since and is still producing, and from which he received until his death September 3, 1938, $125,000, or more. (Tr. R. 10-19). The failure of Pratt and the Houston Oil Co. to put of record the oil and gas lease assignments is sufficient proof that they knew the contract of September 28, 1925 was illegal and void.

By the foregoing, which is the truth, first, because proven by the records of the Houston Oil Co. and Pratt, and, second, because never denied by the Houston Oil Co., Pratt forfeited his right to represent his corporation before the contract was made. The Houston Oil Co., being a co-conspirator with him, it must take the consequences which follow, namely, it became a mere constructive trustee of the property it unlawfully took possession of under the unlawful contract with the Pratt-Hewit Corp., the cestui que trust.

While the fraud, and the bribery, and the buying of the discretion of Pratt cannot be disassociated from the acts which the Houston Oil Co. admits the situation presents this issue: the contract is void because Pratt by these secret dealings placed his personal private financial interests in conflict with the duty he owed his corporation, when he instanter forfeited his right to represent it. This issue of conflict of private interests with duty is

not mentioned or referred to in Respondent's Reply, nor is it spoken of, or mentioned, or denied in any pleadings of the Respondent or the Pratt-Hewit Corp. It is not mentioned in the Refugio County district court's judgment or by the Court of Civil Appeals. Likewise, the United States District Court in its Findings of Fact and Conclusions of Law makes no finding on the question of whether or not Pratt had placed himself in a position where his private interests conflicted with his duty. (F. Tr. R. pp. 509-520). Then, too, the United States Circuit Court of Appeals makes no mention of this issue. (132 Fed. (2d) 748) The Houston Oil Company, the State District Court, The Court of Civil Appeals, and the United States Circuit Court, all take the position that because the United States District Court found "that there is no evidence of fraud, no credible evidence of fraud, before me on the part of either Thomas H. Pratt or W. E. Hewit" (F. Tr. R. p. 516) that completely determines the case.

The foregoing is not only an error of law but completely ignores petitioner's issue that Pratt through his secret dealings with the Houston Oil Co. had forfeited his right to represent his corporation due to conflict between self-interest and duty, irrespective as to whether or not there was any fraud. Courts have universally held in Texas and all other states and the Federal Courts, namely, that an officer's right of representing his corporation ceases the moment conflict of interest arises between personal interest and duty, irrespective as to whether it is

accompanied with fraud. This is discussed in the supporting Brief with citations from Texas and from other states on pages 72 to 82, inclusive.

Respondent's Reply, p. 3:

> "The Federal District Court after trial held that there was no evidence of fraud or **illegality** and that the order of dismissal with prejudice was not void and that the plea of res judicata should be sustained."

is error, in that the word "illegality" which undoubtedly refers to the contract, was not mentioned at all in the Federal District Court's Findings of Fact and Conclusions of Law. That phrase, "fraud and illegality" is used several times in Respondent's reply intending thereby to convey that the legality of the contract had been passed upon, when in fact it never has been by any court.

The contract, being void, because prohibited by Texas statutes, and because made by Pratt for his corporation after he had disqualified himself by placing self-interest in conflict with his duty, makes entirely immaterial the findings of the Federal District Court, the Circuit Court of Appeals, the State District Court, the Court of Civil Appeals, and the Supreme Court of Texas. Likewise, what was said by attorneys is all immaterial for there is *no power* of any kind, *or act* of anyone, or of the courts, or attorneys, or of a legislature, that *can breathe any life into a void contract or a void judgment*. For

authorities and discussion of void judgment see supporting Brief, pp. 3-4.

Likewise, an illegal contract is not subject to ratification, and res judicata has no application when judgment is void. For authorities see p. 94 of supporting brief.

On page 12 of Respondent's Reply it says that petitioner has pointed out that no law of Texas was involved in this case and, therefore, the State Court did not and could not abridge "privileges and immunities" belonging to petitioner as a citizen of the United States. This entirely misconceives the law applicable, because the Respondent's statement assumes that the immunities and privileges of a citizen of the United States can be abridged only by the law of the state when the courts have universally held, that is, the Supreme Court of the United States, that whenever the state through any of its agencies or departments, whether by its legislatures or its courts, or other departments of government, abridge the privileges or immunities of a citizen of the United States, the 14th Amendment of the Constitution of the United States is involved.

The privileges and immunities of a citizen of the United States are extensive and one of them is the right to resort to the courts for protection without restriction. What these privileges and immunities are is discussed in authorities cited on pages 43-45 in the supporting brief.

6(a) On pages 4 and 5 of Respondent's Reply, the case of Consolidated Cause No. 1154, styled A. D. Rooke, et al., v. H. M. Allen and Houston Oil Company, is referred to. Respondent says "That case involved incidentally the validity of the Joint Operating Contract."

This is an erroneous statement of the nature of the action. Rooke had given a lease to the Pratt-Hewit Oil Corp. of some 1200 acres, consisting of three separate tracts. Pratt and Hewit, having no money with which to promote the oil venture, sold oil and gas lease acreage, which is real estate, out of two of these tracts to the 400 stockholders for the purpose of raising money and thereby evading the Security Law of Wisconsin. This was along in 1921, 1922, and 1923. There was no oil or gas production in Refugio County at that time, it was the wildest of wildcat territory, therefore practically worthless, yet acreage was sold at from $25 to $100 per acre (Fed. Tr. R. 609) to Wisconsin buyers who knew nothing about the oil business. $400,000 or more was raised in that manner. ((See Tr. R. pp. 6-9) No development work in the way of drilling wells had ever been attempted on two of the large tracts of the Rooke lease in which the stockholders owned lease acreage. Consequently, in 1933 Rooke commenced an action to cancel the lease and was required to make the lessee and the sub-lessees defendants. The Pratt-Hewit Corp. and all its stockholders who owned acreage and the Houston Oil Company were made defendants. It was plain that the validity of the September 28, 1925 contract was

not in issue. That litigation was concluded in 1938, a year before stockholders Wert T. Reed and the petitioner, learned of the secret financial dealings between Pratt and the Houston Oil Company.

Whether or not the validity of the contract had been in issue is wholly immaterial for, as is the universal rule everywhere, no court or no party can vitalize a writing which is void on its face.

Respondent, on page 3 of its reply says; "on the hearing of the motion there was introduced no evidence of fraud or illegality in the contract." All the facts and all the evidence, are set out in detail in petitioner's proposed amended petition which was made a part of the motion and is a part of the record. No one denied these facts. The Respondent was in no position to deny the facts alleged in said petition because they are taken from the records in the office and from its contracts and oil and gas lease assignments, etc. Therefore, for this motion and for this application for certiorari those facts, according to Rules of Procedure and of evidence, must be taken as speaking the truth.

In several places in Respondent's reply, particularly on page 2 thereof, it makes a statement like the following: (speaking of the judgment of January 26, 1937) "dismissed with prejudice entered at the request and agreement of all parties" also see similar Statement on page 15. The Respondent knows that there was no one there in person or by representative, except those mentioned on the rec-

ord which gives a complete statement of what took place on January 26, 1937. (Tr. R. 32-37, incl.). The same record is also to be found, but in a slightly different order, on pages 223-228, Federal Transcript of Record.

There is nothing in the record to show that petitioner was present in person or by attorney. In the Federal Court he testified that he knew nothing about the dismissal until eighteen months thereafter. (Fed. Tr. R. p. 804) Nor is there any thing in the record to show that any of the 400 stockholders were there in person or by attorney, except five of them who were represented by an attorney.

Even the Pratt-Hewit Corp. was not there, that is, was not represented by anyone, because Pratt and J. V. Vandenberg, Jr., Pratt's private attorney who tried to represent Pratt's corporation, were disqualified because Pratt's corporation was the true plaintiff. Therefore, such attempted representation by Pratt a defendant and his attorney was no representation. The record shows this.

This was a stockholder's action—the stockholders were all plaintiffs—they had a right and an interest in the litigation, which could not be taken away without notice of some kind. This occurred in VACATION TIME. Most of the stockholders lived in Wisconsin. There is nothing in the record which shows that notice had been given to ALL the stockholders through court order or otherwise.

Furthermore, the quotation from Respondent's reply, just given, is a plain mis-statement. The judgment does not state that the 400 stockholders were present or represented by attorneys or were even given notice that the case was to be taken up in vacation time and dismissed with prejudice. The following is part of the judgment.

> "Be it remembered that on this the 26th day of January A.D., 1937, in vacation and upon the request and agreements of the plaintiff, the interveners, and the defendants herein this cause came on for hearing whereupon plaintiff, interveners, *and defendants all* requested the Court to dismiss this suit from the docket of this Court with prejudice but at the cost of the defendants." (Tr. R. 35-36)

A stockholder, under proper conditions, may bring a suit in behalf of his corporation and all the other stockholders similarly situated, and has a right to prosecute the action to judgment, providing it is carried on in good faith. However, such right, when so exercised, does not give such stockholder who brings the action the right to step into court in vacation or any other time and join the defendants in dismissing the action, and particularly with prejudice, without the court or someone else having apprised all the stockholders of what was contemplated to be done. Such a practice, if permitted, would open the door to most gigantic frauds and constitute a violation of the due process clause of the 14th amendment to the Constitution of the United States.

as so clearly and forcefully pointed out by this Court in the case of Hansberry v. Lee, 311 U. S. 32.

Respondent, in several places in its reply, refers to the September 28, 1925 contract as "a joint operating contract" (pp. 4 and 5). That is a misnomer. When under the contract the Houston Oil Co. alone was given the right to drill and develop the acreage, to decide when and where new wells should be drilled; when it alone had the right to market and fix the price at which the gas and oil should be sold and to whom; and when it has been shown they sold it to the Houston Pipe Line Company, its alter ego; where it sat on both sides of the bargaining table in fixing the price and all that was left for the directors of the Pratt-Hewit Corp. to do was to distribute whatever the Houston Oil Co. gave them—that certainly cannot be called "a joint operating contract." See supporting brief, pp. 45-49, inclusive.

Respondent closes its Reply by quoting the following: "There should be an end to litigation." That slogan cannot apply in any case where trial and appellate courts which have jurisdiction to pass upon the merits of a case HAVE REFUSED to pass upon and determine fundamental issues, jurisdictional, and others, when such refusal necessarily means taking one man's property and giving it to another without a judicial determination.

The litigation in this case has never been com-

pleted because the main issues have never been passed upon but have been IGNORED by the courts.

This case, as shown on pages 75 to 79 of the supporting brief, shows that the conflict between self-interest and duty of which Pratt was guilty commenced two or three months before the September 28, 1925 alleged contract was entered into and continued every day through the remainder of his life, and thereafter through his son George Pratt and his son-in-law, M. A. Shaw, as officers and directors of the Pratt-Hewit Corp. Every month when they receive a check and accept it, including the one they received this month, presents a continuation of the conflict of interest and is a new offense against the Pratt-Hewit Corp., its stockholders, and this petitioner, out of which cause of action may arise. This is plainly explained and set out in the opinion of Mr. Justice Holmes in the case of United States v. Kissell, 218 U. S. 607, 608, 31 S. Ct. 124, 126. See supporting brief p. 78.

Every day, even while this case is pending before this Honorable Court, the property of the Pratt-Hewit Corp., its stockholders and this petitioner is being given away to the Houston Oil Company, without there having been any JUDICIAL DETERMINATION OF THE RIGHT OF THE HOUSTON OIL COMPANY TO TAKE THIS PROPERTY, ALL IN VIOLATION OF THE DUE PROCESS CLAUSE of the 14th Amendment of the United States Constitution. Every day that the Houston Oil Co. takes a part of this gas and a part of this oil

to itself without such right being determined by a court, DIRECTLY INVOKES THE JURISDICTION OF THIS COURT. Fayerweather v. Rich, 195 U. S. 276. See supporting brief, p. 35.

Respondent says, "The litigation must end." But Respondent's unlawful taking of the Pratt-Hewit Corp's oil and gas, unmolested by courts of justice as long as oil or gas or other minerals may be produced from the corporation's leases, must continue.

WHEREFORE, petitioner prays that his application for writ of certiorari be granted.

Respectfully submitted

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(26)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NO. 864

F. F. DOLLERT, ET AL,
Petitioners

v.

PRATT-HEWITT OIL CORPORATION, ET AL
Respondents

PETITION FOR REHEARING

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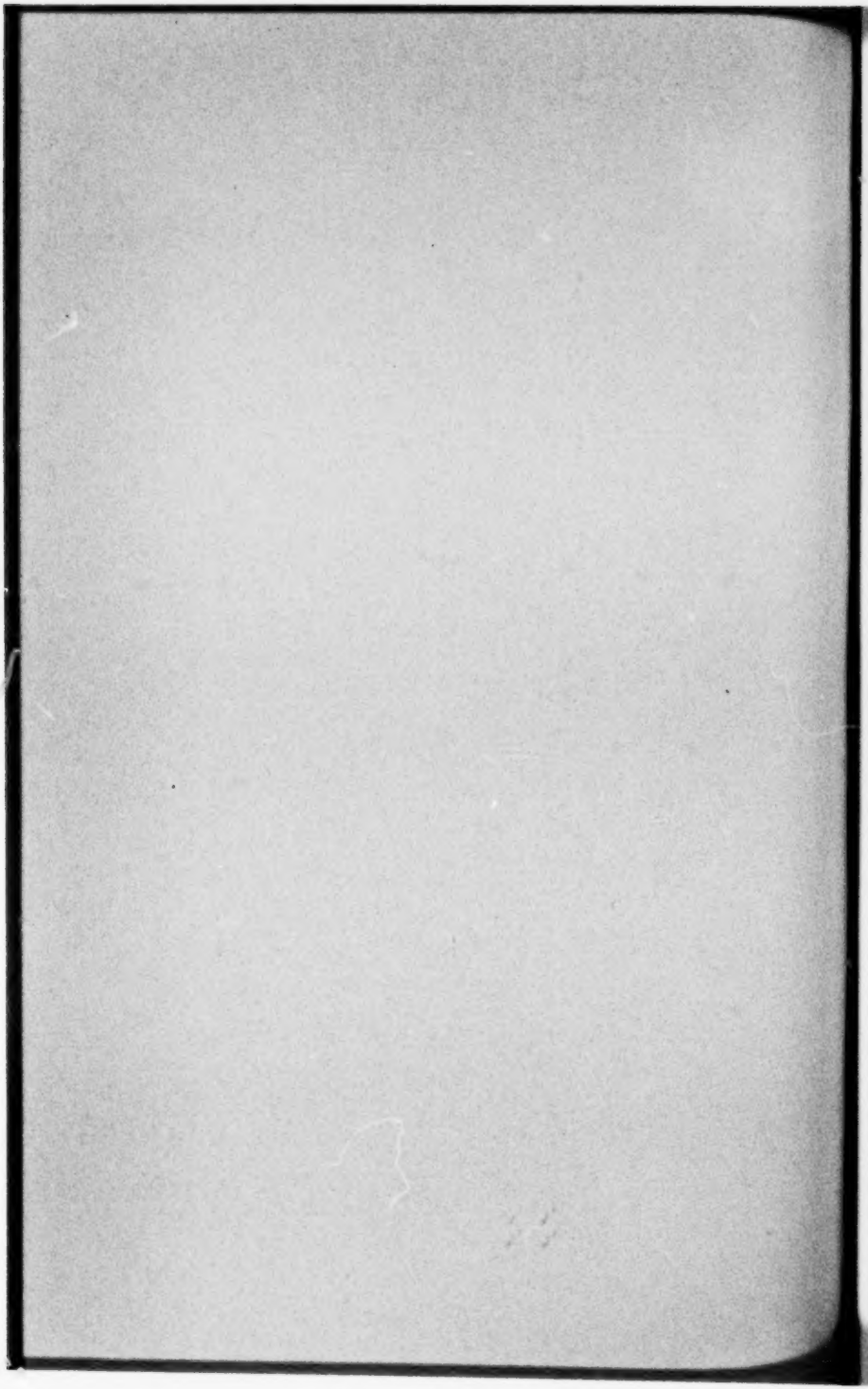

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PETITION FOR REHEARING

To the Honorable Chief Justice of the United States and the Justices of the Supreme Court of the United States:

In our judicial system, as set up in the Constitution of the United States, it certainly was the intention of the makers of that instrument that in some court every litigant in good faith should have

the constitutional right to have a judicial determination of the issue or issues presented by him in his pleadings filed in a court of Justice. Then, too, it was equally the intent of the makers of the Constitution that when the trial courts which have jurisdiction to pass upon the merits of the pleadings have failed in their duty and have not accorded the litigant his constitutional rights, that is, have not judicially determined the issues presented, there should be a Supreme Court which could accord to the litigant the rights which are his under the Constitution of the United States. If this is not true, then Justice is dead.

This Honorable Court has been called truthfully the final guardian of the constitutional rights of the people. What does that mean if it does not guarantee to every citizen relief when the lower courts have erred in failing to pass upon issues of merit, with the result that one man's property is given to another? Does not such error of the trial courts give jurisdiction to this Honorable Court if it is the final guardian of the constitutional rights of the people? Fayerweather v. Rich, 195, U. S. 276.

Petitioner, in his pleadings filed in the courts, both state and Federal, has presented to those courts in good faith six jurisdictional and fundamental questions. These have never been answered or disputed by the defendants and have never been mentioned or judicially determined unless complete silence is a judicial determination.

The following are the six questions in substance presented by petitioner.

1. Does the September 28, 1925 contract, its validity being the subject matter of this litigation, unlawfully delegate the managerial powers of the Pratt-Hewit Corporation to the directors of the Houston Oil Company? For discussion of this see Application for Certiorari, pages 45-59.

2. Does that contract violate the Texas Usury Statute? For discussion of this see Application for Certiorari, pages 49-65.

3. Does the said contract violate the Anti-Trust and Anti-Monopoly Statutes of Texas? Appl. for Cert. pp. 65-71.

4. Is an officer of a corporation, while acting for that body, able to make a valid contract with another corporation when, at the same time, he is having secret financial dealings with that other corporation? See Appl. Cert., pages 71-75.

5. In a shareholders' action, does the plaintiff stockholder have the power at any time to dismiss the action with prejudice without first giving notice to all the stockholders? Is such a dismissal valid? Is it binding upon the corporation? Would not that alleged right deprive the other stockholders of their property,

namely, the right to prosecute the action to judgment, in violation of the 14th Amendment of the Constitution of the United States? Is not such judgment void on its face? Hansberry v. Lee, 311 U. S. 32. Appl. Cert. 75-82.

6. In a stockholders' action, where the dominant stockholder and official is a defendant, with the corporation also made a defendant because the officials of the corporation would not bring the action, may such dominant official and his private attorney represent the corporation in consenting to a dismissal of the action in which the corporation is the true plaintiff? Is not such judgment so entered void on its face, as against the corporation?

Petitioner wants definitely to be understood that he is basing his application for certiorari not upon an erroneous determination of the merits of these issues, but **solely** upon the fact that, contrary to his constitutional rights, there **never** has been a judicial determination upon the **merits** of these **issues** in **any court** and that this fact bestows jurisdiction upon this Honorable Court.

At no time has a single one of the defendants ever denied the facts upon which petitioner bases these issues, nor has a single defendant ever taken issue with the legal contentions of petitioner. The facts are admitted and the legal conclusions of petitioner are undisputed. Yet no court has ever

mentioned the issues or determined one of them unless silence is a judicial determination.

If silence on the foregoing issues constitutes a judicial determination, then let us see to what that leads.

It has always been an elemental, fundamental and universally adopted principle that when the jurisdiction of the court is attacked it becomes the duty of the court to stop all proceedings immediately until it affirmatively passes upon the question of its jurisdiction. The lower courts, although their jurisdiction was attacked, at no time ever passed upon that question. If silence is a judicial determination, have not these said lower courts overruled that foregoing principle of law procedure and made it possible for courts hereafter, when their jurisdiction is attacked, to ignore the same and proceed to render a judgment which they might be powerless to decree?

If silence is a judicial determination of questions such as petitioner's, then on Issue 1, where petitioner contends that the September 28, 1925 contract unlawfully delegates the managerial powers of the Pratt-Hewit Corporation to the directors of the Houston Oil Company, such silence overrules the Supreme Court of Texas in the case of Temple v. Dodge, et al, 89 Texas, 69, and also overrules the Circuit Court of Appeals of the United States (7th) in the case of Sherman and Ellis Inc. v. Indiana

Mutual Gas Company et al, 41 Fed. 2d, 588. See Pet. Cert., 45-59 and particularly 57 and 58.

Likewise, each one of the other issues of petitioner could be taken and analyzed and if silence constitutes a judicial determination against petitioner, then every one of the Texas, Federal and other state cases cited by petitioner in support of each of his issues is overruled.

If courts can overthrow in effect long established principles without rendering an opinion, then that power would soon throw our whole judicial system into utter confusion.

The discretion vested in an appellate court, one which has power to pass upon the merits of the issues in the case, is not an absolute but a judicial discretion which in some instances is as mandatory as written language can express. It is petitioner's position that when the effect of an appellate court's decision is to overrule long standing principles, it is mandatory that it state its reasons.

If the position is taken that silence does not constitute a judicial determination, then petitioner's issues have never been passed upon, in violation of his and his corporation's constitutional rights.

Thus, whatever horn of the dilemma is taken, the jurisdiction of this Honorable Court attaches.

Furthermore, the Federal District Court and the

Circuit Court of Appeals of the United States did not pass upon any of these issues nor did they even mention them. They said that there was no fraud and therefore dismissed the action. Of course the issue of whether or not there was fraud is immaterial. This does not decide one of the issues presented to the courts by petitioner. That is glaringly obvious.

Even on the question as to whether Thomas H. Pratt had forfeited his right to represent his corporation in the making of the September 28, 1925 contract because of his undisputed extensive financial secret dealings with the Houston Oil Company, the issue of frand is utterly immaterial, as the courts of Texas and of other jurisdictions have universally held. See Texas and Federal cases cited on Pages 80-82 in the Application for Certiorari.

The Court of Civil Appeals passed over entirely the issues presented to it and merely labeled petitioner's motion as a motion for new trial.

Each one of the foregoing courts begged the issue by assuming that the September 28, 1925 contract was legal.

The defendant Houston Oil Company, in all its briefs, has continually dwelled upon the defense that there was no fraud, as a concluson arising from the dismissal of the case with prejudice on January 26, 1937, saying that this decision was res judicata as to whether there was or was not fraud. Consequent-

ly, the Houston Oil Company's briefs, pleadings, and what they do not say and have studiously avoided referring to show that petitioner's issues have never been passed upon by any court.

Inasmuch as petitioner has repeatedly called attention to and strenuously insisted that his issues have not been given a judicial determination by any court and his contentions have never been challenged by the defendants, **not even** an attempt has been made by the defendant to disprove the same and not **one** court before which these issues were raised has ever said that even one of these issues has been decided or even mentioned, does not petitioner have a right to feel that he has been denied his constitutional rights and his corporation's property has been confiscated and is still being confiscated by the oil and gas being taken out every day from under its leases by the Houston Oil Company? And does it not therefore also indisputably appear that the jurisdiction of this Honorable Court, the final guardian of petitioner's and his corporation's constitutional rights, **has attached?**

Respectfully submitted

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Of Counsel

CERTIFICATE OF ATTORNEY

I, one of the counsels for theabove-named appellant, do hereby certify that the foregoing petition for rehearing of this cause is presented in good faith and not for delay.

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Counsel for Appellants